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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

[illegible]

THE SUPREME COURT

OF THE

STATE OF MICHIGAN.

VOLUME I.

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CASES

DETERMINED IN THE SUPREME COURT

OF THE

STATE OF MICHIGAN,

AT DETROIT,

JANUARY TERM, 1847.

(CONTINUED FROM II DOUGLASS.)

PRESENT:

HON. CHARLES W. WHIPPLE,
HON. WARNER WING, } JUSTICES.
HON. GEORGE MILES,

MAY *v.* RUMNEY ET AL.

Under the Ordinance of 1787, a widow is entitled to dower, as at common law, in all the lands of which her husband was seized during coverture.

Actions for the recovery of dower are not within the statute of limitations of 5th Nov. 1829, Laws 1833, p. 408.

The right to dower is unlike any other right to land known to the law, and its peculiar nature is such as to exempt it from the operation of all general statutes of limitations, however broad and comprehensive, in which it is not named, or by unavoidable implication included.

CASE reserved from Wayne circuit court. Ejectment for dower. Plea not guilty. On the trial the jury found a special verdict, stating that James May and Margaret May, the plaintiff, were married on the 30th September, 1797; and that James May, on the 20th March, 1807, was seized in fee of the land in question, and that on the 17th June of the following year he conveyed the premises to Daniel Mc Niel, by a good and sufficient conveyance, in which the plaintiff did not join. That James May died in January, 1829, leaving the plaintiff his widow surviving him, and that her dower in the premises had not been made assigned or recovered. The defendants were in possession as tenants to John Garland, who, at the time the suit was commenced, was seized in fee of the estate conveyed by James May to Mc Niel; and McNiel and those claiming under him had been in the peaceable and undisturbed possession of the premises from the 17th June, 1807, down to the commencement of the present action. The plaintiff moved for judgment on the special verdict, and the question was reserved by the circuit court for the opinion of this court.

Davidson, for plaintiff.

Douglass & Walker, for defendants.

By the Court, WING J.

The first question presented by the special verdict is, whether the plaintiff was, on the decease of her husband, entitled to dower in a lot of land of which her husband was seized during the coverture, but of which he was not seized at the time of his death.

It is admitted by the parties that this question is to be determined by the Ordinance of 1787, which contains the only express provision in relation to dower that has any bearing on this point.

The second section of the first article of the ordinance provides, "That the estates both of resident and non resident proprietors in the said territory dying intestate, shall descend [here follows the course of descents], saving in all cases to the widow of the intestate, *her third part of the real estate* for life, and one third part of the personal estate; and this law relative to descents and dower shall remain in full force until altered by the legislature of the district."

It is insisted by defendants' counsel, that as the provision for dower is connected with the provision directing one third of the personal estate to be assigned to the widow, it is manifest the framers of the ordinance intended that they should both be placed upon the same footing. And as both were innovations upon the common law, the provision to be made for the widow, out of the personal estate, was intended as a compensation to the widow for her loss of dower in lands of which the husband had been seized during the coverture, but which he had alienated; thus limiting her claim to dower, to lands of which the husband died seized.

The previous part of the section is employed in regulating the descent of estates, and a different rule was established from any that had prevailed in any part of the country over which the ordinance was designed to be operative. Had the common law rule in relation to descents been adopted, this saving clause in relation to dower would not have been necessary; but as if to avoid misconstruction, and to prevent the new rule from operating injuriously to the interests of the widow, a saving clause was introduced, recognizing some existing right. If the words used had been saving to the widow one third, instead of *her* one third part of the real estate for life, the defendant might have insisted with more reason that it was intended to provide a new rule of dower; but the right of the widow being mentioned in a saving clause, and the terms used being *her* third part, there is an obvious recognition of some ascertained existing right, protected and defined by some previous law, and which it was intended to affirm and continue in all its force and extent. This construction is strengthened by the fact, that in the other part of the sentence, relating to the personal estate, the word *her* is dropped. Then to what law in force in this country was reference made in this part of the ordinance? It appears to me most manifest that the reference could have been to no other than the common law, for the terms used are common law terms, having a well known meaning. The word dower used in the concluding part of the sentence is a common law term, and it is there used to designate the widow's third part of the real estate before mentioned.

It is matter of history, that for a long period previous to 1783, Great Britain held dominion over the district of country embracing much of what has been known and designated as the north-western territory. Previous to that period, and as far back as 1763, (when it was ceded by France to Great Britain as a conquered province) this portion of territory continued in the exclusive possession and occupancy of Great Britain, formed a part of her colonial possessions, was a part of the province of Upper Canada, and continued to be governed by her laws.

That the common law of England was in force in Upper Canada with such modifications as may have been made by the local legislature of the province, can hardly be doubted. It was the basis of their rights, and formed the rule of decision in civil and criminal cases. This being a matter of history, will be noticed by courts.

In 1783, the territory was ceded by Great Britain to the United States, but its actual possession was not relinquished to the United States until July, 1796, at which period we find the common law in force here, as it was generally in the United States. In 1787, the ordinance was adopted by the congress of the United States. It was designed for the whole north-western territory, including Ohio, Indiana and Illinois, as well as the country now embraced within the limits of this state. The instant the United States took possession, the ordinance became operative, and laid down the principles which constituted the groundwork of the future government. And the law of dower referred to and affirmed in this instrument continued, for many years after Ohio, Indiana and Illinois were erected into separate states, to be the only law on this subject in those states respectively.

It was never questioned, so far as I can learn, in either of these states, that the widow was by the ordinance entitled to dower in lands as at common law, until the case of Betts *v.* Wise, reported in 11th Ohio Rep. 219, in 1842, which arose under this clause of the ordinance, and in which it was insisted, for the defendant, that the widow's dower was limited to one third part of the real estate of which her husband died seized. Chief Justice Lane delivered the opinion of the court, and after stating the common law, remarks: "Such is the common law of dower, an institution existing wherever the common law obtains—a rule which each people has the right to change, but a conception which none could shake off without substituting some other provision in its stead. It was to a people under the dominion of this idea that the ordinance was addressed, and far from assuming to prescribe a different rule or confer a new right, it does no more than recognize an existing institution, and takes care that it receives no prejudice by the operation of the law of descents. We can regard it as no less than an authoritative acknowledgment of the estate in dower at the common law, to which law we must refer to learn the signification of the term, and the extent of the dowress' interest." The judge adds: "Since the organization of the territory, a wife was dowable of all lands within it of which her husband was seized at any time during the coverture." This opinion of Judge Lane appears to be quite conclusive upon this subject.

In addition to this judicial construction of the ordinance, we find provisions in the Woodward and Cass codes of laws, adopted in the territory of Michigan soon after the organization of the territory, and in subsequent codes, requiring the wife to unite with the husband in the sale of real estate, and declaring the manner in which she should be barred of her dower, which shows the construction put upon the ordinance by our earliest law makers. See Woodward Code, 1805, pp. 53, 81; Laws 1820, pp. 30, 158; Laws 1827, pp. 65, 259; Laws 1833, pp. 264, 332. Thus we have a legislative and judicial construction of this clause in the ordinance which seems to establish its true meaning to be, (as at common law), that the wife is entitled to be endowed for her natural life of the third part of the lands whereof her husband was seized, either in law or in deed, at any time during the coverture. 4 Kent's Com. 35; Park on Dower 5.

So highly (says Judge Kent) was the law of dower esteemed, and so anxious were our forefathers to secure its undisputed establishment, that in its modern sense and enlarged extent, as applying to all lands of which the husband was seized during the coverture, it was incorporated amongst the provisions of Magna Charta, and it has continued in the English law to the present time; and with some modifications it has been everywhere adopted as part of the municipal jurisprudence of the United States. 4 Kent's Com. 36.

To the consummation of the title to dower three things are requisite, viz.; marriage, seizin of the husband, and his death. 4 Kent's Com. 36. The concurrence of the two former circumstances is properly the groundwork of the *title*, of which the death of the husband is the consummation. 4 Kent's Com. 36; Park on Dower 7. From the period when the husband dies, the incipient title which existed in the wife during the coverture becomes consummated and perfected, and her right of action to obtain the fruits of that title commences. Park on Dower, 247.

At common law it was competent for the heir to assign the widow's dower on the death of the husband, but if it was not assigned she had certain remedies. She had no right of entry until the dower was assigned to her, and she could not maintain a possessory action. The legal remedy to enforce an assignment of dower was by writ of dower, *unde nihil habet*, or writ of right of dower, brought against the tenant of the freehold, upon which, if she obtained judgment, dower was assigned. She might then proceed to recover possession by ejectment. Park on Dower, 283.

No demand of dower was necessary; the right of action was perfect without it; and the widow, by failing to make demand, lost her portion of the profits of the estate previous to the demand. Park on Dower, 288; 7 Cowen 288; 6 John. Rep. 295. Thus stood the rights and remedies of the widow, in reference to dower, at the common law.

By an act of the governor and judges of the territory of Michigan, passed February 26, 1821, (Laws 1833, p. 387, § 40) all the common law remedies for the recovery of dower were abolished. It is insisted by defendants that this statute gives the writ of right instead thereof. By an act of the legislative council, (Laws 1833, p. 332, §1) it was provided, "that if the heir or other person having the next immediate estate of inheritance, should not within one mouth set out to the widow of the deceased her dower, &c., then such widow might sue for and recover the same by writ of dower brought against the tenant." The remedy provided by this act is substantially the same as the common law remedy by writ of dower, which was in the nature of a real action. The form given in the statutes seems designed to embrace a declaration in substance, as at common law. The difference is, the declaration or complaint is contained in the writ, and the common law proceeding is in other respects somewhat simplified. This act, and the act of February, 1821, continued in force until repealed by the Revised Statutes of 1838.

Defendants' counsel insist that this action is barred by the statute of limitations of November 5, 1829, (Laws 1833, p. 408) the first section of which provides, "that no writ of right or other real action, no action of ejectment or other possessory action, of whatsoever name or nature, shall hereafter be sued, prosecuted or maintained for the recovery of any lands, tenements or hereditaments, if the cause of action has now accrued, unless the same be brought within ten years after the passing of this act, any law, usage, or custom to the contrary notwithstanding."

This statute seems to be broad enough to cover all possible remedies for the recovery of an interest in lands, and yet it does not in terms enumerate the action of dower provided by the acts to which I have referred. It becomes necessary, therefore, to determine whether the nature of the widow's right, and the remedy provided for the recovery of dower, previous to the Revised Statutes of 1838, were such as to bring them within this statute.

From an examination of the English and American statutes of limitations, and the decisions upon them, it will be found that the rights of widows to dower have been highly favored. It has been fully established in England by a uniform course of decisions, and in most of the United States, that the wife's remedy by action for her dower is not within the ordinary statutes of limitations. Wells *v.* Beall, 2 Gill & John. 468; 3 Kent's Com. 3d edit. 70, in note; Swift's Digt. edit. 1822, p. 85; Barnard *v.* Edwards, 4 N. H. Rep. 109; Spencer *v.* Weston, 1 Dev. & Bat. 213; Guthrie *v.* Owen, 10 Yerg. Rep. 339; and yet if we examine some of the American statutes, it will be found they are as broad and comprehensive as the statutes under consideration. It will also be seen that the reasons why the action for dower is held not to be within the statutes, are, that the action for the recovery of dower is not expressly named—that no implication can be raised against such action on account of the favor with which courts have regarded the widow's rights, and because the peculiar nature of the right, and the general object of such statutes, is such as to exempt this action from their influence.

The English statute of 32 Hen. 8, c. 2, applies only to cases where the demandant counts only upon his own seizin or that of his ancestor. In Angell on Limitations, p. 33, it is stated that this statute extends not only to writs of right, but also to all other writs in the nature of a writ of right, in which the demandant must allege a seizin, and in which he seeks to recover a hereditament. But it does not extend to cases where the demandant does not count upon the *seizin of himself or his ancestor*, as in the writ of right of dower. In Bro. reading on this statute, it is said a woman brought a writ of dower of the seizin of her husband sixty years past. The action lyeth because that is not of her ancestor or predecessor, neither is it an action possessorie, and it is not prohibited by the statute. Appendix to Angell on Limit. 55. In Park on Dower, pp. 311, 342, it is stated that no statute of limitations has prescribed any period for bringing a writ of dower.

Chancellor Kent (4 Kent's Com. 61) lays down the general doctrine that the widow cannot enter for her dower until it is assigned to her, nor can she alien it. It is a mere chose in action, and cannot be sold. She has no estate in the lands until assignment. The special verdict in this case finds the fact, "That said widow's dower in said premises has never been *made, assigned or recovered.*" That the widow *cannot enter* for her dower is affirmed in the following American authorities: 1 Yeates 425; 9 Mass. 13; 4 id. 388; 7 John. Rep. 247; 17 id. 167; 20 id. 411; 5 Munford 346; 16 Mass. 193; and that the statute of limitation does not run against dower until such assignment is made, is clear from the same authorities.

But it is insisted that our statute is more extensive than the English statute of Hen. 8, and 21 Jas. 1, c. 16, upon which the English decisions are made—that it is not limited to a right of entry or possession, but extends to the right of action. The following statutes are similar to our own, and are quite as broad and comprehensive. The statute of North Carolina provides "That no person nor their heirs, which shall hereafter have any *right or title to lands*, &c., shall enter or *make claim* but within seven years next after his or their *right or title* which descends *or accrues*, and in default thereof shall be utterly excluded from entry or claim thereafter." In that state it has been decided that a widow's right of dower is not subject to the statute of limitations until after it is assigned.

The Georgia statute of limitations enacts, "That all writs of formedon, &c. (enumerating those of 21 Jas. 1) or any other writ, suit or action whatsoever, at any time hereafter to be sued or brought by means of any *title* or *cause* hereafter accrued, &c., shall be sued and taken within seven years next after the passing of this act, or after the title or cause of action shall or may descend or accrue to the same, and that no person or persons that now hath or have, or which hereafter may have, any right or title of entry into any lands, &c., shall at any time hereafter make any entry but in seven years." This statute is surely as comprehensive as ours, and does not contemplate solely the case of a seizin which once existed, and from which the statute is to run. The supreme court of Georgia, in the case of Wakeman *v.* Roache, 1 Dudley's Rep. 123, which was an action for the recovery of dower, in which the statute was plead, say: "These words (referring to the first part of the section above quoted) would seem sufficiently comprehensive *to embrace every remedy*, and unless the case of dower is excepted because of its own distinguishing peculiarities, it must be included. Every title, as it accrues, carries with it and confers on him in whom it is invested, a right to reduce the same to possession by entry. In this respect the title of dower is peculiar, and forms an exception. It is, as Park observes, the *only probable case in which a complete title does not confer the right* to reduce the same to possession by entry. The title of the widow to be endowed is not of an undivided third of the entirety, but of a third part in severalty; until that third part is ascertained and assigned by *metes and bounds, she has no right of entry.* Upon what would she enter? An undivided third? She is not a tenant in common, and therefore this cannot be. Before the assignment of dower, *her right rests merely in action,* and until that right is reduced to certainty by the ascertainment of her third part in severalty, there is nothing upon which she can enter, or which she may reduce to possession. Upon this subject the authorities are conclusive." The court further remark: If, however, the statute should be held to operate as a bar to the enforcement of a *mere right,* unattended by a right of entry to be affected by it, there is nevertheless an insuperable difficulty in the court's mind to the operation of it in this case. There is a continuity of title from the husband to the wife. After assignment she is in by relation from the death of the husband. The intermediate entry and seizin of the heir between the death of the husband and seizin is not adverse, and does not disturb the continuity of title. Coke says, the law adjudgeth no *mesne seizin* between the husband and wife. Park on Dower, 156, 340. The assignment is considered as proceeding from and made by the husband, and this notwithstanding the estate is created by operation of law, without regard to the will of the husband, and notwithstanding the intermediate estate of the heir. It is obvious from these principles, that the *right of action* to have an assignment of dower does not result from any adverse right of possession in the heir or *feoffee,* and as a consequence, says Park, the mere possession of the heir or feoffee can never become a bar to the title of the wife. A possession under a claim or color of title, to be a good bar under the statute, must be founded on an adverse right of possession; and an adverse possession will be negatived when the parties claim under the same *title,* or when the possession of one party is consistent with the *title* of the other party. Adams on Eject. 43. The court gave judgment for the demandant.

The Revised Statutes of Massachusetts, c. 119, §1, provide "That no person shall commence an action for the recovery of any lands, nor shall make any entry thereupon, unless within twenty years after the right to make such entry or bring such action first accrued, or within twenty years after he, or those from, by, or under whom he claims, shall have been seized or possessed of the premises, except as hereinafter provided." In the case of Parker *v.* Obear, (7 Metcalf 24) a writ of dower was brought. The tenant derived his title to the premises from the husband of the demandant, through Joseph Parker, deceased, and he relied upon the above recited statute of limitations as a bar to the action. The court say, "the language of the statute is very broad. That a writ of dower is a writ for the recovery of lands, and taking the language of the statute without any qualification, it would seem to be a bar." And after referring to and commenting upon some of the authorities above cited, the court say, "We are clear that the statute of limitations was made with another purpose, and however broad the general words may be, they are not applicable to claims for dower."

In New York, in the case of Hogle *v.* Stewart (8 John. Rep. 104), which was an action for dower, the facts were shortly these. The writ was returnable Nov. Term, 1808. The demandant was married to John Hogle before the revolutionary war. He was seized of the demanded premises when he died in 1777, and Elizabeth his wife continued a widow. Hogle was duly attainted for adhering to the enemies of the state, in the late war. The commissioners of forfeiture sold the premises in which dower was demanded to one Henry, who conveyed to the tenant who held them ever after. One of the provisions of the act of attainder was, "that no person, &c., who now have, or shall or may hereafter have, any estate, right, title, claim or demand, to any lands, &c., supposed to have been forfeited, &c., and which have been heretofore granted or conveyed to any person, &c., shall after the expiration of five years from and after the passing of this act, &c., prosecute, sue, or maintain any action or suit at law, for the recovery thereof, *against the right and title so granted* by the people of this state, as above said." The court say, "No action shall be prosecuted or maintained, after the expiration of five years, against the right and title granted by the commissioners; the right of dower is neither adverse to the right forfeited, nor is it against the right and title granted by the state, but is in concurrence with both. The seizin of the purchaser from the state is derived from the husband, and is a continuation of that seizin upon which the claim of dower is founded." Spencer dissented. Kent, Thompson, Yates and Van Ness concurred in the opinion given as that of the court. In the case cited from Massachusetts, the court say the reasons in this case of Hogle are applicable to the case before them.

I do not find any decisions in any of the states which give a different construction to their statutes of limitations, except a case in South Carolina, in 1 Const. Rep. 112. I have not seen the volume containing the case, but the court in the case of Parker *v.* Obear, in speaking of it say, The court held that "the statute of limitations of that state was a bar to the claim for dower, unless prosecuted within five years." But the decision was principally grounded on the express words of the statute, and the court were not unanimous in their opinion, and the English decisions there referred to relate to a case of alienation by fine, with proclamations. Stat. 4 Hen. 7, c. 24.

The stat. of South Carolina provides: "If any person to whom any right or title to lands, tenements or hereditaments shall descend or come, do not prosecute the same within five years after such right or title accrued, then he, she, or they shall be forever barred to recover the same." Brevoid Justice says, It is true dower is favored in law, and the act of limitations, being in restraint of the common law, is to be construed strictly, but it is equally true that the act of limitations, in this state, plainly and certainly limits the right of action to recover the possession of lands to five years after the right of the party accrued, descended or came.

It is well settled as a principle of law, that there must be an adverse possession before the statute of limitations can commence to run. 8 East 248; 2 Bos. & Pul. 542; 1 Dall. Rep. 67; 1 Caines' Rep. 394; 1 John. Rep. 156; 2 id. 230; 1 Wash. Rep. 37; 4 Cranch 367.

In Blanchard on Limitations, pp. 9, 13, it is stated that "these statutes of limitations never run against a man whilst he continues in the seizin, *therefore, to make the length of possession a bar* under them, it must be a possession adverse to and inconsistent with the title of the true owner." "And though the owner be out of possession, the statute only begins to operate from the time of right to enter accruing." Lord Mansfield, also, in the case of Fairchild *v.* Stockton, asserts the same doctrine. The widow is not a joint tenant nor tenant in common with the heir, devisee or grantee.

Then is the title and possession of the defendant in this case adverse to that of the demandant ? If not, it is not perceived how the plaintiff's action can be defeated. Park, in his treatise on dower, p. 153 (335) says, "Although a title of dower is for most purposes nothing more than a right of action, and consequently transferable in no other mode than by release to the terretenant by way of extinguishment, yet it differs from all other mere rights of action in not being the result of any *adverse jus possessionis acquired by the heir or feoffee*, and as a consequence the possession of the heir or feoffee can never become a bar to the title of the wife."

It would seem, then, from an examination of the statutes, and authorities on this subject in England and many of the United States, that the right of dower is unlike any other right to land known to the law, and that its peculiar nature is such as to exempt it from the operation of all general statutes of limitations, however broad and comprehensive, in which this action is not named or by unavoidable implication included. Those statutes apply as a bar to those persons whose right of entry is lost by their own laches, or by the laches of those under whom they claim, but the widow has no right of entry. Independent of the favor with which courts are bound to regard the right of dower, it is such that the possession of the heir or purchaser cannot be adverse to the claim of the widow. The estate of the widow arises by operation of law, and is not created by grant. And as the lands, when held by the husband, are subject to the inchoate or incipient rights of the wife, if the husband deed them the purchaser takes them in the same way, subject to the same legal incidents, of which they cannot be divested except by the act or death of the wife. The purchaser enters into possession, not under a full and perfect title, but under a title subject to the dower of the wife, with which his title well consists, and to which it is in no wise opposed.

It was urged in the case of Hogle *v.* Stewart, that as a purchaser entered under a deed from the state, in which there was a warranty of title, the purchaser must be considered as having entered under a title adverse to all others. But it was said by the court, that "it was true the state was bound to defend the purchasers of forfeited estates against all claims whatsoever; the deeds given by the commissioners of forfeitures were for an absolute estate, but as it was known that the attainder did not impair the widow's right of dower, the state intended to indemnify the purchaser against such right whenever it should be made and enforced." So in this case. It will not be said the purchaser did not know he took the land subject to the wife's right of dower; and if there is a covenant of warranty in the deed, in case of a recovery of dower the estate of the deceased husband must respond for the value of the dower interest recovered by the widow of the purchaser. If it be said the estate may not be worth anything, it may be replied, the purchaser knowingly ran his hazard in this regard.

There are strong reasons why the widow should not be compelled, at the peril of a loss of her rights, to enforce them within the period limited by the statute in question; as, where the husband conveys without her joining, and receives the full value of the land, the wife, being otherwise provided for, would not disturb the grantee, unless misfortune befel her. But if limited to ten years, widows would uniformly enforce their rights within that period, in anticipation of a day of need.

I can see no reason why courts should not now, as formerly, look upon the claim of dower with great favor, and maintain the truth of what Lord Coke says was commonly said, that three things be favored in law,—*life, liberty and dower.*

Certified accordingly.

Lockwood *v.* Drake.

Under R. S. 1838, ejectment must be brought against the person in actual possession of the premises, when they are occupied by any one.

A verdict in ejectment was as follows: "The jury find for the plaintiff, and that the plaintiff is entitled to the possession, during her lifetime, of the one undivided third part of [describing four eighty acre lots, according to the United States survey], except so much of said two last described portions or parcels of land as is contained in the record of the plat of the village of Royal Oak, recorded in record of deeds for said county of Oakland, as the reasonable dower of the said plaintiff in said premises." *Held*,

1st. That the description of the land in the verdict was sufficiently certain, and that it would be good in a declaration.

2d. That although the verdict did not find defendant wrongfully withheld the premises, yet that it was good, as it was intelligible, and no doubt could arise as to what was the intention of the jury.

Case reserved from Oakland Circuit Court. Ejectment for dower, commenced on 29th May, 1844. On the trial, one Cooper testified defendant claimed to be the owner of the land at the time the suit was brought; that previous to October, 1843, witness was a tenant to defendant of a part of the land; that defendant's brother had been in possession of the premises since May, 1843, and had controlled them as his own; and that in the fall of 1843, defendant said he owned the property. Several other witnesses testified, that at the time the suit was commenced, defendant claimed to own the property; but there was no testimony showing him in actual possession. The court charged the jury, that if they found the defendant was not in possession of the premises at the time the suit was commenced, they must find for the defendant. That the plaintiff must bring the suit against the person in actual possession.

The jury rendered the following verdict:

"The jury find for the plaintiff, and that the plaintiff is entitled to the possession, during her lifetime, of the one undivided third part of the west half of the north east quarter of section numbered twenty-one, and east half of the north west quarter of section numbered twenty-two, in township one north of range eleven east, in the county of Oakland and state of Michigan. Also the west half of the north west quarter of section twenty-two, and the east half of the north east quarter of section twenty-one, in township one north of range number eleven east, in said county; except so much of said two last described portions or parcels of land as is contained in the record of the plat of the village of Royal Oak, recorded in record of deeds for said county of Oakland, as the reasonáble dower of the said plaintiff in said premises."

Defendant moved to set aside the verdict, and for a new trial, on the following grounds: 1st. That the verdict of the jury was uncertain and indefinite as to the description of the land, which it did not describe with the certainty required in a declaration. 2d. That the verdict was contrary to the evidence and the charge of the court. 3d. That the jury did not find defendant unlawfully withheld the premises from the plaintiff. Which motion was reserved for the opinion of this court.

Drake, in person.

Hosmer, for plaintiff.

By the Court, WING J.

The 4th sec. of chap. 2, title 3, part 3, of the Revised Statutes of 1838, expressly provides that the action shall be brought against the actual occupant, if the premises for which the action is brought are actually occupied by any one; and in such case the 13th section requires service of a copy of the declaration to be made on such occupant. If not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.

The proof shows without a shade of controversy, that defendant's brother was in the actual occupation of the premises claimed at the time of the commencement of the action; that he had so occupied them from May, 1843, and had controlled them as his own. It is in proof, that in the fall of 1843 defendant said he owned the property; and it was proved by other witnesses, that at the time of the commencement of the suit, the defendant claimed to own the property; but there was no evidence to show that defendant was in the actual possession.

There appears not to have been the slightest ground for the verdict of the jury under the charge of the court, (which was undoubtedly correct) and the proof. It was clearly contrary to evidence, and therefore ought to be set aside. Suppose judgment was rendered upon this verdict, could the sheriff deliver possession to the widow? He could not disturb the occupant in his possession, nor deprive him of whatever rights he might have. He may be the owner, as it is said he controlled the land as his own. The occupant is *prima facie* the owner, and until he is made a party he cannot be ejected by a judgment against a person out of possession, claiming title, though no title in him is shown. It does not appear from the testimony who is the legal owner of the premises. The law would have been satisfied if suit had been brought against the occupant, and it does not authorize a suit against any one else, so long as there is an occupant. It says such actual occupant shall be named defendant in the declaration. On this ground we think the verdict should be set aside.

As to the first reason alleged for setting aside the verdict, we are of opinion that the description of the land, as set forth in the verdict, is sufficiently definite, and that it would have been sufficient if so stated in a declaration. The numbers of the lots are given. This complies with the first requisite of the statute. In reference to the lands excepted out of the last two lots, it does not appear they were or had been occupied, or that there were any natural boundaries. The metes and bounds are given, which furnish as accurate a designation as perhaps could be given without inserting a long description, which probably would not enable a surveyor to find the lines any more readily than he could from the description given; "*id certum est quod potest certum fieri.*"

As to the third point: The principles established in the case of Lamberton *v.* Foote, 1 Doug. Mich. R. 102, would appear to be applicable to this case. The verdict is intelligible, and no doubt can arise as to what was the intention of the jury.

Certified accordingly.

HARRINGTON ET AL. v. SCOTT.

Where A obtained possession of the premises occupied by B, by knocking the door open with a hammer in B's absence, and in A's absence B soon afterwards re-entered by similar violence. *Held*, that A's temporary occupation so acquired was not such *quiet and peaceable* possession as would enable him to maintain forcible entry and detainer under R. S.

To sustain a complaint for unlawful and forcible entry and detainer, under R. S., there should be proof of such acts of violence as amount to a breach of the peace. Proof that the defendants (there being only two of them) repaired alone to the premises, and that one of them pounded upon the door and it was opened, whereupon they both entered, is not sufficient.

CERTIORARI to two justices of the peace of the county of St. Clair, to remove proceedings had before them, for a forcible entry and detainer. The facts appear in the opinion of the court.

Van Dyke & Emmons, for plaintiffs, in error.

Backus, for defendant, in error.

By the court, WHIPPLE, J.

The transcript shows that the plaintiff below instituted proceedings against Harrington and Young, under the forcible entry and detainer act. The complaint filed with the justice does not appear in the return, it having, as the parties state, been lost. Enough appears, however, to show that the proceedings were under the provisions of the 1st, 2nd and 3rd secs. of chap. 5, tit. 3, part 3 Rev. Stat. The form prescribed by statute for the warrant to be issued, contemplates that the substance of the complaint should be inserted therein. The warrant, among other things, recites that Scott was in the quiet and peaceable possession of lots number three and twelve, in the village of Port Huron; and that being so quietly and peaceably possessed, the said Harrington and Young, with force and arms, and with strong hand and multitude of people, made forcible entry into and upon the lands, &c., and still do with strong hand detain the same.

Without noticing the various points made by counsel upon the argument, it will be sufficient to consider the case upon its merits. The evidence shows that on the 24th of October, 1845, Scott, accompanied by one Follensby, repaired to the premises, and that the former demanded of Young the keys of the two buildings situated thereon; that Young gave to Scott the key of the bake-house, and upon being asked where the key to the other building was, replied that he did not know, but supposed that Harrington had it. Young, upon being requested by Scott to remove some effects out of the building, replied that he would not, as he had nothing to do with it; Scott at the same time saying that he wanted possession of the building: that Scott having gone to the shop of one Saunders, soon returned with some tools, and with a hammer knocked the door of the building open. He then directed Saunders to take off the lock on the door and replace it by another, which being done, the door was locked, and the key handed to Follensby by Scott, with directions to take care of the premises. Follensby further testified, that on the 27th October following, Harrington and Young went to the premises, and that he saw Harrington "pound" on the door of the building, which was opened, and both then entered. There was no evidence whatever to show that Scott had any interest in the premises, or that he was ever in the possession of the buildings referred to by the witnesses. The question now arises, whether the jury, under such evidence, were authorized to render a verdict of guilty against the defendants. We think they were not. The evidence, if it shows anything, proves conclusively that Scott was a mere intruder; that he obtained possession of the buildings by violence; and that his *actual* possession, thus obtained, continued but a few minutes. Scott then seeks to dispossess the defendants and obtain restitution of the buildings, by a proceeding under the provisions of the statute above referred to. In the first place, the allegation in the complaint, that he was in the quiet and peaceable possession of the premises, is proved, if at all, by the testimony of his own witness, who swears that this *peaceable and quiet* possession was obtained by knocking the door open with a hammer, while Harrington, it is fair to infer from the evidence, was in possession. Now it is very clear, that a possession acquired in this *peaceable* and *quiet* way, does not constitute such a possession as would enable a party to maintain trespass under the facts disclosed in the return. A party cannot make a possession, thus acquired, the ground-work of an action. If he could, then should we hold our homes by a precarious tenure. Beside, what evidence is there to maintain the allegations contained in the complaint, that the defendants, with force and arms, and with strong hand and multitude of people, made forcible entry, &c., and with strong hand detain, &c.? The summary proceeding provided by our statute is a substitute for a proceeding by indictment in England: it is in its nature a criminal proceeding, and the same proof is required to convict a party under such a proceeding, as would be required to convict him if indicted. The language of the complaint is not satisfied by proof that one of the defendants pounded on the door of the building: there should have been proof of such facts as would amount to a breach of the peace: there is an entire absence of proof going to show, either that the entry was made by the defendants with strong hand and multitude of people, or that the premises were with strong hand detained by them. The testimony fully establishes the fact, that the defendants repaired *alone* to the premises, and that but one of them, without doing any act calculated to excite a breach of the peace, re-entered into possession. But it is useless to pursue the subject any further: the plaintiff below has sought to predicate a right to obtain restitution of premises, the possession of which he first acquired by violence and wrong; and for this reason, if no other existed, the judgment must be reversed.

Judgment reversed.

SPEAR *v.* CARTER ET AL.

Nothing is to be presumed in favor of the jurisdiction of a justice of the peace, which must be shown affirmatively.

By statute, the jurisdiction of justices of the peace was restricted to certain actions, and judgments by confession might be entered for any sum not exceeding $150, "provided that such confession be in writing, signed by the person making the same, in presence of the justice or one or more competent witnesses." Laws 1838, p. 193. A judgment was rendered by a justice in these words, after entitling the cause: "Judgment by written confession of the above named de-

fendants, in favor of the above named plaintiff, for eighty-eight dollars and eighteen cents damages, and costs of suit." *Held*, the judgment did not show, and was not *prima facie* evidence that the justice had jurisdiction of either the persons of the defendants, or of the subject matter of the suit, and that it was therefore void.

A justice can render judgment on confession of the party only in those actions which he has jurisdiction to try.

Where jurisdiction is unqualifiedly withheld, consent, or the confession of a judgment, will not render the proceedings valid.

Case reserved from Macomb Circuit Court. An action was brought by plaintiff on a judgment rendered in his favor against defendants by one Sheldon, a justice of the peace, on 8th September, 1837, of which the following is a copy:

Archibald Spear,
vs.
Harlehigh Carter and
James H. Rose.

Judgment by written confession of the above named defendants in favor of the above named plaintiff, for eighty-eight dollars and eighteen cents damages, and costs of suit.

On the trial the justice's docket was proved, containing an entry of which the above is a copy, and was then offered in evidence by the plaintiff and admitted by the court, though objected to by defendants on the ground the judgment was void. Evidence was also given to show the original papers in the case could not be found, and that the justice had left the state, but no written confession was produced. A verdict was rendered for plaintiff, and defendants afterwards moved for a new trial, which motion was reserved by the court.

Goodrich, for plaintiff.

Terry, for defendants.

By the court, Wing, J.

The Justice Act of 1833, in force in 1837, authorised a justice of the peace to enter judgment by confession for any sum not exceeding $150, *provided that such confession be in writing, signed by the person making the same, in presence of the justice or one or more competent witnesses*, and every such justice is thereby authorized to hold a court for the trial of all such actions, and hear, try, and determine the same: Provided always, that no justice of the peace shall have cognizance of any action where the title to land shall in any wise come in question, or of false imprisonment, or of slander, or of malicious prosecution, nor of matter of account where the sum total, &c.

Had the justice in this case jurisdiction of the subject matter of the action, or of the persons of the defendants? Does this appear affirmatively on the face of the proceedings?

The record only sets forth "judgment by written confession of the above named defendants, in favor of the above named plaintiff, for $88..18, damages and costs of suit."

It does not appear that suit was commenced by the plaintiff against the defendants, or that the defendants voluntarily appeared before the justice, or that he ever saw them, or that any writing signed by the defendants in the presence of the justice *or one or more competent witnesses, was before him.* Nor does it appear what the cause of action was upon which the judgment was entered. And therefore it does not appear whether the claim or cause of action was of such character as that, by the statute, the justice was authorized to enter judgment upon it. None of these things being apparent from the record or proceedings in the cause before the justice, or in the case certified to this court, can it be affirmed the justice had jurisdiction of the cause of action, or of the persons of the defendants?

In the case of Borden *v.* Fitch, 15 John. Rep. 141, the court say: "To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the *person*, and of the *subject matter;* and the want of jurisdiction is a matter that may always be set up against a judgment, when sought to be enforced, or when any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose." Mills *v.* Martin, 19 John. Rep. 33; Willes 199; 2 Har. and John. 130.

The act prescribes the causes in which the justice may act, and cases in which he may not act and is expressly prohibited from acting. Nothing is presumed in favor of jurisdiction; it must be shown affirmatively. In Wight *v.* Warner, 1 Doug. Mich. Rep. 384, and Clark *v.* Holmes, id. 390, all the cases are cited, and the doctrine above stated is fully illustrated and enforced. Goodwin, J., in giving judgment in the first case says, "What is necessary to give jurisdiction must fully appear."

In the case of Beach *v.* Botsford, 1 Doug. Mich. Rep. 199, a judgment is stated to have been rendered upon the written confession of a defendant (which is given), signed by him but not attested. Morell, J. says, "The justice derives his authority to enter the judgment solely from the statute, and the confession of judgment should show that the statute was complied with. It does not appear, from the entry of the judgment, that the confession was written and signed in the presence of the justice, or one or more competent witnesses. It was clearly the intention of the legislature that the witnesses should so subscribe." He also says: "The statute not having been complied with, the judgment is a nullity. The consent of the party cannot make a void judgment valid. The justice therefore had no jurisdiction over the person of the defendant."

The statute gives no authority to a justice to render a judgment upon confession except in the section cited. It is the basis of his jurisdiction, it is the foundation on which his judgment must rest. His authority must expressly appear, and that, too, clearly and affirmatively, before faith and credit can be given to his acts.

In the case of Tenny *v.* Filer, 8 Wen. 569, it appeared that no process was issued, and that defendant did not appear before the justice to confess judgment, but as the justice was crossing the street the defendant told him to enter judgment against him in favor of the plaintiff in the judgment. The court say, by the act, "a justice of the peace is authorized to enter judgment by confession of the defendant. The act of 1818 was the same, and under that statute the court laid down the broad principle, that a justice could not legally enter a judgment unless the defendant appeared in person or by attorney before him, in *court*, and confessed judgment, or had been duly summoned, as in ordinary cases."

In this case there may have been a written confession, as in the case of Beach *v.* Botsford, or as in the case of Clark *v.* Holmes, or it might have been by letter without being attested; and as it does not appear how it was done, and until it appears that it was done in compliance with the requirements of the statute, it cannot give the court jurisdiction. Besides, it does not appear to have been entered in a case of which the court had jurisdiction. The plaintiff's counsel urges that, "as it appears there was a confession in writing, this *prima facie* gives *jurisdiction*, and a *prima facie* case of jurisdiction being thus made out, this court will presume the form of the confession to have been right." But is a *prima facie* case made? A confession in writing, signed by the parties, does not make a *prima facie* case, and there is nothing in the record or case importing more than that there was a written confession, signed by the defendants. It was manifestly the object of the legislature to protect the rights of defendants. It was a matter of repeated complaint, that judgments were entered against defendants, purporting to be upon their confession, when they knew nothing of it; and to avoid all chance of fraud, the statute provided a mode, *as the only mode*, in which judgments by confession could be entered; and it was to be done, if at all, under such circumstances as to render it certain that the confession was actually made, before the justice could act in the matter. If the judgment in question is to be held good, the requirements of the statute are nugatory.

The plaintiff's counsel admitted, on the argument, that the justice was limited as to the kind of actions he might "*try*." But it was insisted he might "*take a confession in any form of action.*" This remark was grounded on the fact that a confession was voluntary, and the parties were not under any compulsion to confess. But it has been decided that consent will not confer jurisdiction, particularly as to the *subject matter to be determined.* 8 John. Rep. 409; 13 id. 218; 14 id. 432; 17 id. 471. Where jurisdiction is unqualifiedly withheld, even consent or the confession of a judgment will not render the proceedings valid, though it would take away a mere error. See the case of an executor confessing judgment, in 3 Caines' Rep. 129; and so where a justice, by consent, tries the title to land. Griffith's Treat. 19, 20; Cowen's Treat. 11; 6 Wendell 465.

The statute in question, after giving jurisdiction over certain actions by process as well as by confession, provides that the justice shall hear, try, and determine the same. Rendering judgment is a judicial determination upon the facts presented, and is to be made as well upon a confession of judgment as upon hearing the proofs and allegations of the parties.

Certified accordingly.

DUNN v. SUTLIFF.

Surety for costs in a justice's court, in case of appeal, is liable for costs in the appellate court.

A submission to arbitration of the subject matter of a suit is a discontinuance of the suit, and discharges the surety for costs.

CASE reserved from Wayne Circuit Court. Assumpsit. Defendant became surety for costs in a justice's court for one James Sutliff, in a suit brought by Sutliff against Dunn, the plaintiff. Sutliff recovered judgment for $40 damages and $13.20 costs, before the justice, and Dunn appealed to the circuit court. Pending the appeal, the parties entered into an agreement to submit the subject matter of the suit to arbitrators, under the statute, and the arbitrators, after hearing the parties, awarded, "they found for Dunn judgment for costs." Judgment was afterwards rendered by the circuit court on the award, in favor of Dunn for his costs, and an execution was taken out on the judgment and returned unsatisfied. These facts appearing on the face of the plaintiff's declaration, the defendant demurred, and assigned as causes of demurrer: 1st. That the security taken before the justice did not follow the case on appeal into the circuit court. 2d. That the judgment before the justice in favor of James Sutliff discharged the surety. 3d. That if the security followed the cause into the appellate court, the arbitration discharged the liability of the surety. The plaintiff joined in demurrer, and the questions arising upon the record were reserved for the opinion of this court.

Backus, in support of demurrer.

Harbaugh, contra.

By the court, WHIPPLE, J. The first question to be determined is, whether the security taken before the justice, followed the case on appeal to the circuit court. This question must depend upon the construction of the 68th sec. of the Justice's Act of 1841, which is in these words: "Any justice of the peace may in all actions, either before or after issuing of process, require, at his discretion, security of the plaintiff for costs; and the person giving such security shall sign a memorandum in writing to that effect, which the said justice shall keep as a part of the record in the case; and in all cases non-resident plaintiffs shall give such security before process shall issue." It seems to me quite clear, that the security contemplated by this section embraces all costs which the defendant may recover, either before the justice or on appeal to the circuit court. The statute does not limit the responsibility of the surety to costs which may be recovered in the justice's court; and we see no reason for restricting the general language in which the statute is couched. The surety, when he contracts the obligation contemplated by the statute, is fully advised that the judgment of the justice is not conclusive of the rights of the parties, and that the cause may be reviewed upon appeal. The appeal, under our statute, takes up to the appellate court the same cause, and is a re-hearing of the cause upon the merits: it is in the nature of a new trial, and the same reasons which require security for costs in the justice's court, apply with equal force to the costs recoverable at the circuit, upon a re-hearing.

The second cause of demurrer is, that the security was discharged by rendition of a judgment in favor of the plaintiff, before the justice. If we are right upon the first question, this cause of demurrer is not well taken.

The third case of demurrer asserts, that the reference of the subject matter of dispute between the parties, to arbitrators, under the provisions of our statute, discharged the security. We are of opinion that the legal effect of such a reference was to discharge the surety from his contract. The reference of the suit and of the matters in controversy between the parties, to arbitrators, operated as a legal discontinuance of the cause. By such a reference, the cause was withdrawn from the circuit court, and the whole controversy was committed to a tribunal selected by the parties. To extend the liability of the surety to costs that may be awarded by the arbitrators, would be to enlarge the contract of the surety, which was limited to such costs as might be recovered against his principal, either before the justice or in the circuit court, in the cause originally commenced before the former. The error of the counsel of the plaintiff consists in supposing that the judgment was rendered in the *cause* which was pending in the circuit court, when, in point of fact, no *cause* was pending after the agreement to refer to arbitration.

Our Rev. Statutes did not re-enact the provisions of the act of 1833, which authorized the reference, by rule of court, of causes pending in courts of record. If that provision had been retained, and the cause which was pending at the circuit had been referred to referees by a rule of court, then the reasoning of the counsel would have been pertinent. The judgment rendered by the circuit court upon the report of the referees, would have been a judgment *in the cause* originally commenced before the justice, and the liability of the surety would have been unquestionable. As the matter is presented in the declaration, it is manifest that the judgment in the circuit court was not rendered in the cause so commenced, but upon the award of the arbitrators, made and returned to the circuit court under the provisions of our statute.

If our views be correct upon this point, it becomes unnecessary to express any opinion upon the other questions raised by the demurrer.

It must be certified to the circuit court of the county of Wayne, as the opinion of this court, that the demurrer to the plaintiff's declaration should be sustained.

Certified accordingly.

MALONNY *v.* MAHAR.

The oath required to be taken by a collector of taxes (sec. 9, ch. 4, tit. 5, part 1, R. S.) on returning lands on which the taxes have not been paid, may be administered by the deputy county treasurer, in the absence of the treasurer from his office.

CASE reserved from Washtenaw Circuit Court.

Hawkins, for plaintiff.

Kingsley and *Morgan*, for defendant.

By the court, WHIPPLE, J. This cause comes before the court upon a motion made by the defendant for a new trial, and which was reserved for our advice by the presiding judge of the circuit court of Washtenaw county.

The determination of the question, upon which the motion is founded, must depend upon the true construction of sec. 9, chap. 4, tit. 5, part 1, Rev. Stat. That section is in these words: "If any of the taxes mentioned in the tax list annexed to his warrant shall remain unpaid, and the collector shall not be able to collect the same, he shall deliver to the county treasurer an account of the taxes so remaining due; *and upon making oath before the county treasurer, or in case of his absence, before any justice of the peace*, that the sums mentioned in such account remain unpaid, and that he has not, upon diligent inquiry," &c. By the provisions of sec. 22, chap. 3, tit. 3, part 1, Rev. Stat., it is provided "that the county treasurer may appoint a deputy, who, in the absence of the treasurer from his office, or in case of a vacancy in said office, *may perform all the duties of the treasurer.*" The conditions of the bond required to be given by the treasurer, make him responsible for the acts of the deputy. The case shows that the oath was administered by the deputy, in the absence of the treasurer from his office, and that the jurat is in the following words: "Sworn and subscribed before me this 8th day of February, A. D. 1839.

VOLNEY CHAPIN, treasurer of Washtenaw county,
By D. T. McCOLLUM, deputy."

It is to be kept in mind, in giving a construction to these provisions of the Rev. Stat., that they are embodied in one act, and must be construed with reference to that fact. If the provision last quoted stood alone, and disconnected from sec. 9, of chap. 4, no doubt could arise in respect to its construction. It contemplates that the deputy, in the absence of the treasurer from his office, may perform *all the duties* of the treasurer. The case shows that the treasurer was absent from his office when the oath was administered by the deputy. The authority, then, to administer the oath, cannot be doubted, unless the general powers conferred upon the deputy are restricted by sec. 9 of chap. 4, which provides that the oath may be administered by the treasurer, or in his absence by a justice of the peace. Does the language of this section conflict with that which confers the general authority upon the deputy to act in behalf of his principal? In the construction of statutes, it is a fundamental rule, that courts are to search for and give effect to the intention of the legislature; and that in giving a construction to an act, courts should strive to give full force and effect to all its parts. A *strict* construction of the 9th sec. of chap. 4 would seem to restrict the general powers conferred upon the deputy by the provisions of sec. 22, chap. 3. But was such the intention of the legislature? After a careful examination of those provisions of the Rev. Statutes to which we are to look in arriving at a conclusion as to what that intention was, I am led to the belief that no restriction was intended to be imposed upon the general powers so clearly conferred upon the deputy treasurer. It was contended in argument, that, as the legislature had provided in express terms that the oath should be administered by the treasurer, and in his absence by a justice of the peace, it followed, *ex vi termini*, that none other than the treasurer or a justice could administer the oath. This argument would be conclusive if the section which requires the oath to be administered by the treasurer or a justice, was to be construed irrespective of other provisions which are *in pari materia.*

But in the interpretation of statutes, we are to take into view all such parts as relate to the same subject. Applying this rule to the various provisions relating to the question before us, I am unable to perceive why they may not be easily reconciled. It does not necessarily follow, that any restriction is or was intended to be imposed upon the general powers of the deputy, because a duty devolved upon his principal *might* be performed by a justice of the peace. The strict construction contended for by the plaintiff would have the effect to limit the meaning of the section which defines the general powers of the deputy. It is admitted that this court must so limit the general language used in sec. 22, unless we are enabled, by a reasonable and common sense construction, to give full force and effect to the two sections which it is said conflict with each other. But is there anything which authorizes a justice to administer the oath required by sec. 9, inconsistent with the provisions of sec. 22? I am unable to perceive that the authority to administer the oath by the justice, clashes with the authority previously given to the deputy: by one provision of the act, general powers were conferred upon the deputy, which would necessarily include that of administering the oath required to be taken by collectors upon making their returns of unpaid taxes: by another provision, the like power is conferred upon justices of the peace. In adopting sec. 9, it would have been unnecessary, in so many words, to confer upon deputies the authority to administer the oath, inasmuch as, by a previous section, that authority is expressly granted. By this exposition of the two provisions, full force and effect is given to each, without violating any rule of construction with which I am familiar. I have no doubt that this view of the statute fulfils the intention of the legislature, without doing the least violence to the language by which that intention has been manifested. It is hardly credible that an authority like that contemplated by sec. 9, should constitute an exception to the general authority with which the deputy has been vested by a previous section. The form of the oath is prescribed in the section, so that the duty devolving upon the person by whom it is administered is merely ministerial. No reason was or can be given why the deputy should be prohibited from performing a duty so simple, and yet be permitted to perform other duties much more complicated, and exacting the exercise of great care and discretion.

The administration of the oath, then, by the deputy, is in law the administration of the oath by his principal; for the act of the deputy, within the scope of his powers, is the act of the principal, the deputy being the mere agent of his principal. So that the requisitions of sec. 9 are fully satisfied if the deputy performs the duty it enjoins upon the treasurer.

The construction I have given to the statute is the construction which it has received by the executive department of the state government, and by the county treasurers, ever since the R. S. went into operation, and its correctness has never, up to the present time, been questioned. This construction has become universal, and we are not disposed to disturb it at this time, without stronger reasons than were urged by counsel upon the argument. It has become, to some extent, a rule of property. Many titles depend upon it, and in this view it is important to sustain the acts of the deputy, unless his authority to do the act complained of is manifestly against law. This I have endeavoured to show is not the case.

In conclusion, we think that the deputy treasurer had, by a fair and reasonable construction of the statute, the authority to administer the oath required by sec. 9; and that this construction having been uniformly given to the statute by the state and county authorities, we have the right, even if the statute were doubtful, to invoke the aid of the legal maxim, *communis error facit jus*, and sustain his authority.

It must be certified to the circuit court of Washtanaw county, that it is the opinion of this court that a new trial be granted.

Certified accordingly.

Welch v. Frost et al.

A justice of the peace who receives uncurrent or depreciated bank bills of a constable, and gives a receipt for the amount on the back of the execution, is liable for so much money to the judgment creditor, in an action for money had and received, after demand and refusal, who is not restricted to the remedy given him by statute on the justice's bond.

Error in Lenawee Circuit Court. Assumpsit by Frost and Gale against Welch, for money had and received. On the trial it appeared Welch was a justice of the peace, before whom a judgment had been recovered by Frost and Gale against one Miles, on which an execution had been taken out and delivered to a constable, and that the constable had received of Miles on the execution, in part payment of it, bills of the Erie and Kalamazoo Rail Road Bank, which he paid over to Welch, who receipted the amount on the back of the execution. Frost and Gale afterwards demanded of Welch the amount of money mentioned in the receipt, when he tendered them the bills he had received of the constable, which they refused to accept. When the bills were received by the justice, the paper of the bank was in circulation to some extent as money, but was not equal to specie. The court charged the jury, that a justice of the peace who had received money on a judgment rendered by him, was liable for it to the judgment creditor, in an action for money had and received, after demand and refusal; that in receiving money on a judgment, the justice acts under the law, as agent for the judgment creditor, with limited powers; that he is authorized to receive in payment the constitutional currency of the country only, and that if he receives depreciated bills and discharges the judgment, he renders himself liable for the amount. The defendant excepted to the charge, and a verdict having been returned against him, and judgment entered upon it, he sued out a writ of error.

Bills, for plaintiff, in error.

Beaman, for defendants, in error.

By the court, WING, J. The plaintiff in error insists he is not liable to the common law action of assumpsit, for money had and received by him as a justice of the peace: that it is only by statute such an office is created, and that the statute prescribes the duties and determines the liabilities of justices.

The Revised Statutes, page 67, sec. 57, provide that justices of the peace shall give a bond before entering upon the duties of their office. The condition of the bond is prescribed, and is, "if the justice shall pay to each and every person, during his continuance in office, such sums of money as he shall become liable to pay for or on account of any money which may come into his hands as a justice of the peace, &c., the bond shall be void." Sec. 58 provides, that "if any justice shall make default in the condition of said bond, it shall be competent for any person to whom such justice shall become liable, by a breach of said condition, to sue such justice and his sureties, or any of them, in assumpsit, and declare against them generally, for money had and received to the use of the plaintiff; and if the plaintiff establish his right to recover, he shall have judgment for principal, interest and costs, according to the condition of said bond; and on the trial a certified copy of the bond shall be competent evidence to prove the contents and execution of said bond."

On the trial, no allusion was made to the bond of the justice. The action was not founded upon the bond, and if it had been, plaintiff in error insists that no money was received by him; that the defendants, in refusing to receive the bills, have denied that any money was received, it being proved that the bills received by plaintiff were offered to the defendants: that the judgment was not discharged by the receipt of the bills. Plaintiff admits, that if a justice receives anything else but money of a defendant, and discharges a judgment, he is liable to the plaintiff in the execution, but only in the form prescribed by the statute. If he receives *uncurrent money*, he is liable to an action on the case: if he receives *money* and refuses to pay over, he is liable under the statute for money had and received, in which case the bond must be proved, and a breach of its condition shown; and that if Miles was released, it was by the act of the constable, as he received the bills, and plaintiff received them of the constable as a mere naked bailee, and his receipt does not preclude him from showing that money was not received.

The defendants insist that this case must be governed by the decision of this court in the case of Heald *v.* Bennett, 1 Doug. Mich. Rep. 513.

In this case the plaintiff appears to lay some stress upon the fact that the judgment was not discharged. In the case cited the justice entered upon his docket, "Received in full; execution returned satisfied." In this case there is no proof of an entry in the justice's docket of any amount paid, but I do not perceive how it can vary the effect of the receipt that it was indorsed upon the execution. Proof of a receipt in full, or of a part of the execution, indorsed upon it by the justice, would be equally effectual as a defence to the defendant in the judgment, as proof of the same receipt on the docket. Neither do I perceive why the payment of a part, and a receipt for it indorsed on the execution, is not as effectual, *pro tanto*, as a receipt for the whole and an entry of satisfaction by the justice. In neither case could the money be collected again of the defendant in the execution, supposing money to have been paid. In the case cited, the property of the defendant in the execution was levied upon and sold by a constable, and he chose to receive in payment therefor, uncurrent and worthless bank bills. The levy upon and sale of the property to the amount of the debt discharged the defendant. The constable is commanded to make the money on the execution; he cannot levy if the money is tendered to him, and therefore a payment is, equally with a sale of defendant's property, a discharge *pro tanto*. In making the payment, the execution debtor pays bank bills, which ordinarily pass current as money. A tender of current bank bills to the constable would protect the defendant in the execution against the creditor, unless they were refused as not being constitutional money. Such a tender would be good to a creditor, and why not to a constable?

If it is true that a payment to an officer of bills (not spurious) which passed in the community as current or passably current, would not protect the execution debtor against further execution by his execution creditor for the amount the bills were depreciated below the standard value in dollars, then would not any execution debtor feel safe, and especially if the transaction occurred in 1841, as the currency was then. I know of no such case in which the creditor has been permitted to sue out a new execution. It would be otherwise if the constable should receive a promissory note or property of any kind other than money or bank bills. If this reasoning is not correct, and if in any case the execution creditor is not barred from taking out a new execution because the constable has not received from the debtor money, but something else, and indorsed the amount on the execution or discharged it, yet the execution creditor may resort to the constable for money to the amount indorsed as received. By suing the constable, the creditor ratifies the act of the constable. By considering the transaction as a payment, and demanding the money, he loses his remedy over against the execution debtor, and may maintain his action against the officer for money had and received. Armstrong *v.* Garrow, 6 Cowen 465.

If I am right in these views, the fact that there was a sale of the execution debtor's property in the case cited from Douglass does not in principle distinguish it from this case. In that case, though the debtor's property was taken and sold, so far as the justice was concerned, he received the bills from the constable as in this case, so that the position of the plaintiff in this case is the same as that of the justice in that case. If the wrongful act of the constable in that case was no protection to the justice, neither can it be in this case. In both cases the justice received bank bills, and is held responsible to the judgment creditor because he, as the agent of the creditor, receipted so much money, and has taken upon himself the responsibility of discharging the debt so far forth.

I do not regard the statute as having any bearing upon this case. The bond of the justice is intended as additional security to those whose money may come into his hands; and a remedy may be had upon the bond against the sureties. But if the creditor chooses to resort to the justice alone, it was not intended to restrict him to an action upon the bond. In what way would such a proceeding benefit the justice? In no possible way that I can see. The remedy at common law is not excluded by the statute. The statute recognizes a *liability*, or a possible liability, for which the justice and his sureties are to respond. It is upon the common law responsibility that this action is brought.

Judgment affirmed.

MANNING v. DRAKE AND OTHERS.

Demurrer to bill in chancery.

MILES, J., delivered the opinion of the court, of which the following is an abstract:

Where the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer to the relief will also extend to the discovery; but if the discovery have a further purpose, the complainant may be entitled to it, though he has no title to the relief.

Facts essential to the complainant's title to maintain his bill and obtain the relief, must be alleged positively, and cannot be inferred from other facts stated.

Accordingly, where a bill filed by a judgment creditor to reach land alleged to have been fraudulently conveyed to C by his debtor, set forth the conveyance, and alleged that the debtor afterwards continued in possession the same as before, and as he from time to time sold parcels of the land, deeds were executed by C to the purchasers, or to the debtor and then by him to the purchaser, but contained no direct averment that at the time of the alleged fraudulent conveyance the debtor had or pretended to have any interest in the lands, *It was held* bad on general demurrer.

An averment that A and B were appointed and acted as administrators, without alleging that they accepted the trust, is a sufficient allegation that they were administrators.

A bill filed by a creditor against the administrators of his deceased debtor, and others, to set aside a fraudulent conveyance of land made by the deceased in his life-time, so that the land might be available for the payment of his debts, is not within R. S. p. 288, sec. 10, prohibiting the commencement of suits against administrators within one year after their appointment, &c., the land not being assets in the hands of the administrators.

Where a debtor makes a voluntary conveyance of property in fraud of his creditors, to one who afterwards becomes bankrupt, the creditors of the grantor will be entitled to the property for the payment of their demands as against the assignee of the bankrupt.

CASES

DETERMINED IN THE SUPREME COURT

OF THE

STATE OF MICHIGAN,

AT DETROIT,

JANUARY TERM, 1848.

PRESENT:

HON. CHARLES W. WHIPPLE, C. J.
HON. WARNER WING,
HON. GEORGE MILES,
HON. SANFORD M. GREEN, } Justices.

Memorandum.—The Hon. Epaphroditus Ransom, Chief Justice, was elected governor of the state at the November election, 1847, and entered on the duties of the office the first day of January, 1848, when he resigned his seat on the bench. On the 2nd March following, the Hon. Charles W. Whipple was appointed Chief Justice in his place, and transferred from the fourth to the third circuit; and at the same time, the Hon. Sanford M. Green was appointed Associate Justice of the court, and to hold the circuit courts for the fourth circuit, in the place of Justice Whipple. Justice Green took his seat on the bench near the close of the present term.

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Parks *v.* Goodwin & Hand.

Where, between the argument of a cause in error and the decision of the court affirming the judgment, the debtor has been discharged in bankruptcy, on motion the court will grant a perpetual stay of execution.

Motion for a perpetual stay of execution. Goodwin & Hand recovered a judgment in the circuit court of Oakland against Parks, who sued out a writ of error from this court, which affirmed the judgment of the circuit court. Between the argument of the cause and the decision of the court affirming the judgment, Parks was discharged in bankruptcy, and now moved for a perpetual stay of execution on the judgment.

Parks, in person.

Knight, contra.

By the court, WHIPPLE, J. If a party is sued upon a claim or demand, from which he has been discharged by a decree of bankruptcy, he must avail himself of the discharge by an appropriate plea: if he fails to do this he may be made liable, notwithstanding his discharge. The mode in which a party may avail himself of such a defence, is fully pointed out in the bankrupt law. The act, however, makes no provision in respect to a case situated as this is. The party had not been discharged when called upon to plead to the assignment of errors. The case had been argued upon the issue made up between the parties, and submitted to the court for decision. After such agreement and submission it was too late to interpose a plea: nothing remained to be done but to pronounce judgment upon the issue between the parties. But when the judgment of this court was pronounced, he had been discharged from the judgment rendered against him by the circuit court: that judgment had been paid and discharged by operation of law. The defendant in the court below having been thus discharged, it would seem proper that some mode ought to be devised by which effect should be given to his discharge. Had he been present when the opinion of this court was announced and entry of affirmance directed, and suggested his discharge in bankruptcy, this court would either have suspended its judgment, or, having directed the judgment of the court below to be affirmed, would at the same time have given the party the rights secured to him by his discharge, and directed a stay of proceedings. Situated as this cause was when the decree in bankruptcy was granted, it would seem to me the course pursued was the appropriate one. The cause having been argued and submitted, it was proper for the court to give judgment, reserving to the bankrupt the right of availing himself of the benefit of his discharge when an attempt should be made to enforce the payment of the judgment by execution. It is very true that the judgment in this case was a debt created *subsequent* to the discharge of the bankrupt; but the debt was founded upon a judgment from which the defendant in the court below had been discharged: the judgment had, in contemplation of law, been paid and satisfied. Suppose, after the cause had been argued and submitted, the plaintiff in error had paid and satisfied the judgment below, and obtained a discharge from the same, this court would not hesitate to direct a perpetual stay of execution, although the judgment below was affirmed; and yet, the debt created by the judgment rendered in this court had not in fact been paid, but the judgment in the court below, upon which the judgment of this court is based. This is but the exercise of an equitable power over its own judgments, which courts of law possess. The case of Bostwick *v.* Dodge, 2 Doug. Mich. Rep. 331, decided by this court in 1846, is an authority to show that this power may be exercised in a proper case. Dodge had obtained a judgment against Bostwick in the circuit court: Bostwick removed the case to the supreme court by writ of error. His counsel not having received advices from his client, proceeded to argue the cause in the supreme court upon the issue made in that court. The judgment below was affirmed, when Bostwick applied for an order to stay the execution, upon the ground that he had been discharged in bankruptcy after the sueing out of the writ of error, and before errors were assigned and the case argued, and that he did not think it necessary to take any further steps in the case, or advise further with his counsel.

We think if the court could rightfully stay the process in that case, it may in the case before us.

Motion granted.

ROOT ET AL *v.* BARNES.

A certiorari will not lie to remove proceedings had before a justice of the peace, under R. S. 1838, to determine whether a mill pond is unhealthful and productive of disease by reason of the decay of standing, lodged, or fallen timber.

CERTIORARI to a justice of the peace to remove proceedings before him, under ch. 8, tit. 4, part 3, R. S. 1838.

Farrand & Higby, for plaintiffs, in error.

D. Johnson, for defendant, in error.

By the court, MILES, J. The defendant in error, Edward M. Barnes made a complaint in writing to P. C. Lawrence, Esq., a justice of the peace of the county of Jackson, that the plaintiffs in error were the proprietors and occupants of a mill situated in the township of Leoni, in that county; that the pond to the mill was unhealthful and productive of diseases by reason of the decay of a large quantity of standing, lodged and fallen timber within the bounds of the mill pond; and that the pond or a large portion of it was situated in said township. R. S. 1838, sec. 6, p. 535.

Upon this complaint being lodged with the justice, he proceeded to issue a notice, and to empannel a jury for the trial of the same. Two of the persons named in the complaint appeared and contested the matter before the justice, and took various exceptions to the regularity of the proceedings, which being overruled by the justice, they have assigned for error in this court, upon a removal of the proceedings in the case by certiorari.

The statute under which the proceedings in the case were had, R. S. 1838, p, 535, sec. 6, provides that "it shall be lawful for any resident of a township in which a mill pond is situated, to make a complaint in writing against the proprietors or occupants of such mill to any justice of the peace in such township, that such mill pond is unhealthful and productive of diseases by reason of the decay of the standing, lodged or fallen timber, whereupon the said justice shall issue a venire facias to the sheriff or any constable of the county, to summon twelve disinterested men, who shall be freeholders and residents of the county, and said officer shall within a reasonable time summon the jurors to appear at the time and place mentioned in said venire, for the trial of such complaint. Provided, that before the venire shall issue, satisfactory security for the defendant's costs shall be given to such justice: And provided also, that six days at least before the time of issuing such venire, a written notice of said complaint being made, signed by the justice, shall be served on the proprietors or occupants of such mill, so that they may be present at the time of selecting the jury; and such jury shall be selected by writing down the names of twice the number wanted, and each party may strike off six, and the names of the remaining twelve shall be embodied in the venire to try the cause.

The next section provides, that "if upon the trial of such complaint the jury, after being sworn or affirmed to try the matter of such complaint, and after hearing the testimony, if any be offered, shall determine said mill pond unhealthful or productive of disease, and that it arises from the decay of standing, lodged or fallen timber in said pond, the justice shall record such determination on record, and if thereafter the proprietor or proprietors, occupant or occupants, shall neglect or refuse to remove such standing, lodged or fallen timber from such pond, it shall be lawful for any householder resident of the township to prosecute such proprietors or occupants before any justice of the peace of such county in an action of debt, and such householder is authorized to give in evidence the determination of the jury aforesaid, and upon the evidence thus produced, judgment shall be entered for a sum not exceeding the penalty named in the 5th section of this chapter."

The 5th section referred to makes it the duty of all proprietors of mills within this state to clear their mill ponds of all standing, fallen or lodged timber, upon complaint made to them by any justice of the peace of the township where the mill is situated, that the mill pond has been determined unhealthful and productive of diseases in the manner before mentioned; and for every neglect a penalty of not more than $150 is made recoverable in an action of debt, by any person who shall sue for the same.

No provision is made in the statute for reviewing the proceedings thus had.

A certiorari lies in all judicial proceedings in which a writ of error does not lie, and does not lie to remove any other than judicial acts. Tomlin's Law Dic. title Certiorari, p. 299.

In the case before us, the justice does not appear to have acted judicially.

This seems to be a preliminary proceeding to lay the foundation for an action of debt, to recover a penalty for non-compliance with the provisions of the 5th sec. of the act. "The justice has no order to make, no judgment to give, no judicial act to perform." Pugsley *v.* Anderson, 3 Wend. 468; 17 id. 15.

It will be time enough to question the validity of these proceedings when the action is brought to recover the penalty.

Certiorari dismissed.

TEN EYCK v. WING.

Debt on judgment recovered in 1824. Plea, statute of limitations. Replication, that in Nov. 1832, a pluries execution was taken out on the judgment; that on the 17th of the same month defendant filed a bill in chancery and obtained an injunction, restraining proceedings on the execution; that on 17th Nov. 1835, it was stipulated between the parties in the chancery suit, that the injunction be dissolved, that the pluries execution be set aside, that there be a reference to a master to take testimony in the chancery suit, and to state an account between the parties, to state the amount due on the judgment, and ascertain the amount of any and all legal and equitable set-offs to the judgment. That testimony was taken under the stipulation by both parties; that the master made his report in January, 1838, and that in March, 1846, the case was heard in the court of chancery, and a decree made dismissing the bill with costs. On demurrer, the replication was held bad, as the case did not come within the exceptions of the statute of limitations, and the replication did not show such an acknowledgment of the debt as would warrant the implication of a new promise.

Where a new promise is set up to take a case out of the statute of limitations, it ought to be proved in a clear and explicit manner, either expressly, or by such an unqualified acknowledgment as authorizes its implication.

The acknowledgment should contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay, and be unaccompanied by any circumstances or declarations which repel the presumption of a promise, or intention to pay.

CASE reserved from Wayne Circuit Court. The facts appear in the opinion of the court.

O'Flynn, for plaintiff.

Fraser, for defendant.

By the court, MILES, J. The plaintiff declared in debt upon a judgment recovered in the supreme court of the then territory of Michigan, on the 25th day of September, A. D. 1824. The defendant plead that the action was not commenced within eight years next after the rendition of the judgment. To this the plaintiff replied specially, that on the 5th day of November, 1832, he sued out a pluries execution upon the judgment, and delivered the same to the sheriff of the county of Monroe, to be executed; that before the same was executed, to wit, on the 17th day of November in the same year, the defendant filed a bill in the same court sitting in chancery, against the plaintiff, and for *reasons therein set forth*, prayed for and procured to be issued and served upon the plaintiff an injunction out of said court, inhibiting him from all further proceedings upon the execution so issued, until answer filed and a final hearing, and that a subpœna to appear and answer was served upon the plaintiff (the defendant in the bill), who caused his appearance to be entered accordingly. That on the 17th day of November, 1835, a stipulation in writing was entered into between the parties to the chancery suit, by which it was agreed that the injunction be dissolved, and that the pluries execution be set aside, and that an order be granted by any judge of said court during the then vacation to that effect, reserving to the defendant in this case all right to set aside the execution, which was antecedent to the pluries execution, and reserving to the plaintiff all right to amend the same and the returns thereto, or any irregularity in issuing the same; and further, that the chancery suit be referred to a master to take testimony on both sides, and to state an account between the parties, to state the amount due on the judgment, and to ascertain the amount of any and all incumbrances upon certain property in the bill mentioned, and also to ascertain the amount of any and all legal and equitable set-offs to the judgment; that the testimony so taken should be read on the hearing of the cause, subject to all legal objections and exceptions, and that the report of the master should be subject to all legal exceptions, and that the cause should be submitted to the court upon final hearing, either upon written briefs at the then next term, or upon argument thereafter. The replication further states that the testimony of both parties was taken before a master, who discharged and performed his duty and made a report of his doings *in all things*, as required by the stipulation, to the said supreme court, on the 9th day of January, 1838, and that in the term of March, 1846, the pleadings and proofs in the cause and the report of the master were duly submitted to the court of chancery for the *state* of Michigan, for final decision, and that that court, after hearing counsel, made a decree dismissing the bill with costs to the defendant therein, and that the decree is still in full force.

The defendant has demurred generally to this replication, and the plaintiff has joined in demurrer. The question reserved for the opinion of this court is, as to the sufficiency in law of the facts set forth in the replication to avoid the statute of limitations.

The defendant insists, that the only question presented by the pleadings is, whether the plaintiff has brought himself within the exceptions or saving clause of the statute, and that this clause has been strictly construed by courts of justice, and never extended by equity.

As we understand the argument of the plaintiff's counsel, the following are the main propositions sought to be established by him:

First, that he was prevented by the injunction from sooner bringing suit; and, Secondly, that by the stipulation there was a sufficient recognition of the existence of the debt, and acknowledgment of the defendant's liability to pay, to take the case out of the statute.

Without discussing the question whether a new promise can be replied to a plea of the statute in an action of debt upon a judgment, we shall proceed at once to consider the points made by the plaintiff; and as this is upon those points a case of the first impression in this court, we can only refer to the decisions of other courts as illustrative of the principle upon which the statute should receive a construction.

The language of the statute is general, and provides that "All actions of debt or scire facias on judgment shall be commenced and sued within eight years next after the rendition of such judgment, and not after." Laws 1833, p. 571.

By the 9th and 10th sections there are savings in the cases of the arrest and reversal of judgments, of judgments on plea in abatement and upon demurrer, and in favor of infants, femes covert, persons imprisoned or beyond seas, and where a person shall be without the territory at the time the cause of action accrues, and shall not have known property or estate within the territory liable to attachment; giving the person entitled to the action a right to bring the same within the time limited, calculating from the time the impediment shall be removed in cases of infants, &c., and from the time of the return of the party in the latter case.

All these cases so excepted are clearly within the general terms of the act, and but for the saving clause would, upon a reasonable construction, be deemed within its provisions.

General words in a statute must receive a general construction, and if there be no express exception, the court can create none. Demarest *v.* Wynkoop, 3 John. Ch. Rep. 142.

Chancellor Kent, in the opinion in this cause, says it was agreed without contradiction in Stowell v. Zouch, Plowd. 369 b. 371 b., that the general provisions in the statute of fines would have barred infants, femes covert, and the other persons named in the proviso, equally with persons under no disability, if they had not been named in the exception or saving clause; and that in Dupleix *v.* Roven, 2 Vern. 540, the Lord Keeper thought it very reasonable that the statute of limitations should not run where the debtor was beyond sea, but as there was no saving in the case, he could not resist the plea of the statute. The statute of 21 Jac. 1 had no saving of this description. The chancellor also refers to Beckford *v.* Wade, 17 Ves. 87, in which last case reference is also had to 2 Salk. 420, and 10 Mod. 206.

We do not understand the plaintiff as insisting that he comes within the letter of the provisions of the 10th section, but he contends this section should, by an equitable construction, be extended so as to include a case where a plaintiff has been delayed by an injunction out of chancery.

Our statute is substantially a copy of the act of 21 James, with some additions, to the 3d and 4th sections of which the 7th and 9th sections of ours correspond.

Certain cases have been held to be within the equity, though not within the letter of the 1st and 2d provisos of the 4th section of that act; as where the action is brought within six years, and the plaintiff dies before judgment, his executor or administrator may have a new action within the equity of the first proviso. See Wilkinson on Limitations, 43, and the cases there cited.

The reason assigned for this is that the latter, though in form a new action, is in substance but a continuation of the old one. The plaintiff is in no default, and it is not intended that the statute meant to bar where the party has lost his trial by the act of God, if the action is renewed in a reasonable time. In this state, this is now provided for by statute. R. S. 1838, sec. 10, p. 577, re-enacted R. S. 1846, sec. 10, p. 601. But this is not extended to a case of nonsuit, which is either by the voluntary act of the party or the opinion of the court against him, and the suit commenced afterwards is consequently a new suit. Angel on Lim. old ed. 328, and the case there cited. It is to be observed, that in the case of the death of a party, the statute is held not to operate, and the 4th section is only referred to by way of analogy, in determining what shall be a reasonable time, so it can scarcely with propriety be said that this is an extension of the provisions of that section, though such is the language used. All the later cases insist upon a strict construction, and are opposed to such extension. 2 Gall. 319; 20 John. Rep. 46; 3 Pet. Cond. 54. So if an action brought by a *feme sole* abate by her marriage, she and her husband may have a new action. Willes 260, note.

It may be remarked, that the same argument used against a party in case of a nonsuit, that he should not begin again after six years because of his voluntary act in abandoning his suit, failed in this case, it being urged on error to the King's Bench, that the suit was abated by the marriage, the voluntary act of the party; that the statute of limitations was a law of peace for the security of property, and ought not to be extended by equity. The only reply of the court to this argument appears to have been, that the statute had received a favorable construction. 2 Saund. 63 h, note; Huntington *v.* Brinkerhoof, 10 Wendell 278, where the same equitable construction is given to the New-York statute, in the case of an administrator.

In the case of Barker *v.* Millard, 16th Wendell 573, Bronson, J. says the equity of the statute has never been extended far enough to aid a party where the commencement of his suit has been stayed by injunction out of chancery; that he has met with no case where it was held that an injunction out of chancery would suspend the running of the statute; that the contrary doctrine is strongly implied in many cases; that the party to a suit in chancery has often applied to that court to restrain the defendant from setting up the statute in an action at law; and hence, he argues, if the pendency of the injunction would be a good answer to a plea of the statute of limitations, such an application would not have been necessary. He refers to 1 Vern. 74; 2 Atk. 1; Gilbert *v.* Emerson, 2 Vern. 503; Bac. Abr. Limitation of Actions, E 6; Blanshard on Limitations 164; Vin. Abr. Lim. T.

In that case as in this, the statute had commenced running before the injunction was obtained, and counsel insisted that the period of time during which a suit was stayed by the injunction should be *deducted* from the statute.

The 5th sec. of the New-York Law (1 R. L. 186) under which this case was decided, corresponds with the 3rd and 4th sections of the stat. 21 James.

In the case at bar the injunction restrained the plaintiff from proceeding on the pluries execution only, in no way affecting or hindering him by its mandate from bringing suit upon the judgment.

When the statute once begins to run, no subsequent disability will restrain it. On this subject the decisions are uniform. Wilkinson on Limit. 51, and the cases there cited. Even insanity has been held not to obstruct its progress. Doe v. Jones, 4. T. R. 301, by Lord Kenyon, Chief Justice. In Demarest v. Wynkoop, 3 John. Ch. Rep. 129, this subject is treated by the late Chancellor Kent in his usual clear and forcible manner. Speaking of cumulative disabilities he says, "The party can only avail himself of the disabilities existing when the right of action first accrued. If disability could be added to disability, claims might be protracted to an indefinite extent of time, and to the great injury and oppression of the country. It would be impolitic as well as contrary to established rule, to depart from the plain meaning and literal expression of the proviso in the statute of limitations."

In the case before us, the bar was complete in September, 1832, and the injunction was not sued out until the November following.

The next point is, that by the stipulation there was a sufficient acknowledgment of the debt to take it out of the statute. For the purpose of determining this point, it does not seem necessary to follow counsel in the history which has been given of the origin and progress of the idea that the effect of the statute might be prevented by a new agreement. In Clementson v. Williams, 3 Pet. Cond. Rep. 38, Chief Justice Marshall says, "they have gone full as far as they ought to be carried."

It was argued in the supreme court of New-York as late as 1833, that the statute of limitations is a defence not favored by the courts. With the exception of the cases alluded to, and to which we shall hereafter have reference, there is no warrant for this idea, though it would seem to have taken strong hold upon the minds of some judges.

It is true, at common law the plaintiff has the liberty to bring his action when he will, and this statute may have been considered to be in restraint of that right, but the great amount of injustice which has been prevented by it, more than counterbalances any supposed infringement of existing rights by its passage.

Lord Holt, Ch. J., said it was one of the best of statutes, and the pleading thereof no disparagement to any body. Wilmot, J., said it was a noble, beneficial act. Green *v.* Rivett, 7 Mod. 12; King *v* Walker, 1 Wm. Black. 287.

It has also been said that the statute (on which the security of all men depends) is to be favored. Green *v.* Rivett.

Lord Kenyon was a strong advocate for the uniform construction of the statutes of limitation, which were, he said, of the greatest importance, as they are statutes of repose. Doe *v.* Jones, 4 T. R. 308.

Mr. Sergeant Williams, in 2 Saund. 64 a, note 6, says, "although it will now and then prevent a man from recovering an honest debt, yet it is his own fault he postponed his action so long." It has the constant effect of shutting out unjust claims, founded on experiments made to take advantage of carelessness or misfortune, on the chance of vouchers being lost or mislaid. King *v.* Morrall, 6 Price's Exch. Rep, 81, per Garrow, Baron.

Saunders says, the prosecution of actions arising upon contracts not in writing under seal, a long time after they first accrued, was often a great occasion of perjury in witnesses, and oppressive to defendants, and that to avoid this was the object of the statute.

In Clementson *v.* Williams, before referred to, Judge Story says the statute is now considered to be entitled to the same respect with other statutes, and ought not to be explained away. The policy of the statute, says Ch. Kent, is to quiet possession and extinguish dormant claims. 3 John. Ch. Rep. 139. To this might we add, that the stat. of James commences with these words: "For quieting of men's estates and avoiding suits, be it enacted," &c. See copy stat., appendix to Angel on Lim. p. 3.

It is now, says Greenleaf, regarded by the courts as a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. 2 Greenl. Ev. sec. 440, p. 354.

This is the language of Mr. Justice Story, in Bell *v.* Morrison, 1 Peters' Rep. 360.

This view of the statute is in accordance with what we conceive to be the duty of every court, to wit, so to construe it as to give it effect, instead of casting about for an apology to evade it.

We are perhaps not prepared to say with Baron Parke, 14 Mees. & Wels. 744, that a certain train of decisions allowing very slight acknowledgments to take a case out of the statute, was a disgrace to the law; but we can say with him, we trust there is no danger of our falling into the same error. The consequence of this rule of construction is, that whenever a new promise is set up to remove the bar of the statute, it ought to be proved in a clear and explicit manner, either expressly, or by such an unqualified acknowledgment as authorizes its implication. 1 Peters' Rep. 362; Cambridge *v.* Hobart, 10 Pick. 232; 8 id. 206; 2 id. 368. And although it is held no set form of words is requisite to constitute a sufficient acknowledgment, and that it may be inferred from facts without words, Whitney *v.* Bigelow, 4 Pick. 10, yet the acknowledgment ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay, and be unaccompanied by any circumstances or declarations which repel the presumption of a promise or intention to pay. A'Court *v.* Cross, 3 Bing. 329. If there be anything said at the time of the acknowledgment to repel the inference of a promise, the acknowledgment will not take the case out of the statute; the acknowledgment must be consistent with a promise to pay. 3 Serg. & Raw. 211; 9 id. 128; 14 id. 165; 11 John. Rep. 146; 13 id. 288; 15 id. 514. The rule laid down and established by these cases in the courts of Pennsylvania and New York, has received the entire approbation of the supreme court of Massachusetts. 2 Pick. 368; 4 id. 110; 8 Mass. 133; 13 id. 453. In this last case the court held that the vote of a town to settle all disputes with the plaintiff did not amount to an admission that anything was due. See also 5 Pet. Cond. Rep. 480; 3 Greenleaf 97; 4 id. 41, 159.

Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries. This is the conclusion which the supreme court of the United States came to in the case of Bell *v.* Morrison, after the question had been before the court in Clementson *v.* Williams, and after a deliberate examination of all the authorities, English and American, when the case of Wetzell *v.* Bussard, 11 Wheaton 309, was before them. They say, we adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import.

This conclusion is upon the principle that the acknowledgment or promise is deemed a new contract, springing out of and supported by the original consideration. Mr. Justice Story's argument is, that the acknowledgment revives the debt, that its revival supposes it once extinct, and that the act which revives it is what essentially constitutes its new being and is inseparable from it. It stands not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable to raise the *assumpsit* on which an action can be maintained. It was this view of the matter which first created the doubt whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome, and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off as a support for the old. What, indeed, would seem conclusive on this subject is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms, and if he cannot recover by those terms he cannot recover at all.

This position is well sustained by reference to authority, and is to us perfectly satisfactory, as being the true exposition of the principle upon which cases of this character should be decided.

In Bell *v.* Morrison, the question was presented by a bill of exceptions upon error to the opinion of the circuit court, in excluding certain evidence tending to show a new promise, from the consideration of the jury; and one point raised was, whether the evidence so excluded was competent in point of law, to have been left to the jury to infer a promise sufficient to take the case out of the statute of limitations. Such we apprehend is the inquiry here: can we from the facts stated in this replication legally infer a sufficient promise for the purpose?

We could the better determine how far this stipulation is to produce the effect contended for, if the nature and object of the bill were more fully stated in the replication. So far as does appear, it would seem to have been solely for the purpose of the injunction to stay proceedings on the *pluries* execution, but upon what statement of facts is not shown.

It cannot be inferred from the stipulation to take and state an account, that a decree for the payment of any balance was intended by the parties, unless the stipulation was to have the effect of a cross bill, which cannot be insisted; and any such presumption, if it could arise, is rebutted by the other portions of the stipulation, which reserves to the defendant here the right (in the law court we suppose) to set aside the execution, which was antecedent to the *pluries* execution, and reserving to the plaintiff the right to amend "the said executions and the returns thereto, or any irregularity in issuing the same."

It is difficult to give any meaning to this language, except upon the supposition that the plaintiff retained the right to proceed upon the judgment in the law court, if he could. It must not be forgotten, however, that this is accompanied by a claim for the amount of incumbrances upon certain property in the bill mentioned, and of set-offs against the judgment It is true the amount of these does not appear. That amount was to be ascertained by the master; whether more or less than the judgment cannot be known, nor what disposition is to be made of the case in chancery in either event. The stipulation is silent as to that.

But is there, in all this, any acknowledgment of present indebtment? It is an admission that a judgment had been rendered, but at the same moment the party insists upon a counter claim. He had filed a bill to get rid of an execution upon the judgment. The object of the bill had so far been accomplished: the execution was set aside by the stipulation, and the injunction dissolved, or agreed to be dissolved; for all practical purposes it might be considered as dissolved; and if the plaintiff could claim that the stipulation to submit the matter to the court of chancery is sufficient, from which to presume a promise to pay any balance which might in that court be found due to him, the answer to that is, that no such determination has been had. The bill appears by the replication to have been dismissed, and the contingency has never happened.

We cannot perceive in the stipulation any agreement on the part of the defendant to waive any benefit to arise from the running of the statute of limitations. It appears to have been made under such circumstances, and contains such an assertion of a counter claim, as to repel any presumption of a promise to pay to be raised from these facts.

Although we are not by the stipulation enabled to see clearly what was the object of the parties, yet there is no ambiguity in the language used, so as to make a reference to a jury necessary. Lloyd v. Maund, 2 T. R. 760. But if we could decide this point for the plaintiff, has not the claim been again barred before the commencement of this suit, which was instituted on the 27th day of May, 1846?

Upon the argument, a labored and ingenious attempt was made to sustain the position, that the injunction was not in fact dissolved until the determination of the suit in the April term, 1846, of the chancery of the state; but it has failed to convince the minds of this court, when placed in opposition to the language and terms of the stipulation. The replication states that it was agreed that the injunction *be* dissolved, that the pluries execution be set aside, and that an order be granted by any judge of the supreme court, during the then vacation, to that effect.

If we admit that this order was necessary to perfect the record, still no court of chancery would ever punish for disobedience to its writ, after the existence of such an agreement was made known.

Again: it does not appear the injunction was for any purpose other than to restrain proceedings upon the pluries execution. That execution was by the stipulation set aside. There was no longer anything as the subject of the injunction, and it was not possible to incur a contempt in reference to it.

It was, however, strongly insisted, that if the injunction was dissolved by the stipulation, still the plaintiff could not proceed at law upon his judgment, either by execution or by action, for the reason that he had stipulated to await the decision in chancery before proceeding upon the judgment; that the defendant had by the stipulation all the benefit of the injunction, until the case was disposed of in chancery; and that it was designed to stand in place of the injunction, insomuch that the plaintiff could not proceed at law.

We do not thus look upon the stipulation; but if this was the effect of it, can the plaintiff complain of the consequences of his own act? Why make the stipulation, instead of moving to dissolve the injunction? By his own voluntary act he consented to the delay, and cannot now object that he was bound to observe his own agreement.

So far as we are able to discover, the plaintiff stipulated only to submit the claim of the defendant, whatever it was, to the court of chancery, reserving his rights on the judgment in the court of law. If he has construed the terms of the stipulation differently, and wasted his time in the court of chancery, instead of following his remedy at law, it is not the fault of the defendant.

We shall now briefly notice some of the cases referred to by plaintiff's counsel; and first Quantock *v.* England, 5 Burr. 2628. The statute was not pleaded in that case, but the action being by the assignees of a bankrupt to recover a debt due to him, and about which there was no dispute, a question was raised as to the validity of the commission, because the debts of the petitioning creditors were above six years' standing before the sueing of the commission.

The bankrupt appeared and was examined by the commissioners, and was by them declared a bankrupt. This case was decided in 1770.

It had long before this been determined that a party intending to avail himself of the statute must plead it. 1 Saund. 283, n. 2.

The argument of the counsel for the defendant in that case was, that a creditor who had suffered six years to elapse was precluded from applying for a commission. He said this was within the intent and spirit of the statute.

The court unanimously determined that the objection lay only in the mouth of the bankrupt himself, and that a third person could not make the objection.

Lord Mansfield says the statute only takes away the remedy, and the defendant may either take advantage of the statute or he may waive that advantage. This is the principle upon which a new promise is allowed to be proved. What follows was not necessary to the decision of the case. His lordship says, "In honesty he (the bankrupt) ought not to defend himself by such a plea, and the slightest word of acknowledgment will take the caee out of the statute."

It is true, for a long period the courts were not inclined to favor this plea, and the Court of Common Pleas in England refused to set aside a judgment to let in a plea of the statute, or to allow the defendant to add it to the general issue, saying it excluded the merits. 2. Wils. 253; 2 T. R. 390. But in 3 T. R. 124, the King's Bench refused to set aside this plea where the defendant was under an order to plead issuably; and in a subsequent case, 1 Bos. & Pul. 228, the Common

Pleas refused to restrain a defendant from pleading the statute on setting aside an interlocutory judgment, for the plea was not necessarily unconscientious.

Next is the case of Sluby v, Champlin, 4 John. Rep. 461. Yates, J. in deciding the case says, "It is now generally received as law, that if a party acknowledge a debt unpaid, it is such a waiver of the protection of the statute as to repel the presumption of payment, being a recognition of the former liability." This is upon the supposition that the only presumption raised by the lapse of time is payment, which we have seen is much too narrow a view of the "true object and import of the statute,"

Heylin v. Hastings, 1 Salk. 29, is the only case referred to, which was a case of a conditional promise, as "prove it and I will pay."

Smith v. Ludlow, 6 John. Rep. 267, next referred to, is decided on the strength of Sluby v. Champlin. The only question, however, was as to the sufficiency of the acknowledgment of one partner to charge his copartner after a dissolution.

White v. Potter, 1 Coxe, (N, J,) 159, decided in 1793, was assumpsit on a note. To meet the plea of the statute, the plaintiff proved that the defendant admitted he had had the money, but said that the plaintiff, as paymaster of the regiment to which he belonged, had received his pay and retained it to the amount of the note. This was held sufficient to take the case out of the statute. The case is very briefly reported, and the opinion of the court contains nothing more than their decision, without any statement of the principle upon which they make it, or any reference to authority,

In the case of Owen v. Wolley, Bull, N. P, 168, in an action by an executor for money had and received to the use of his testatrix, the defendant was proved to say, "I acknowledge the receipt of the money, but the testatrix gave it to me." Mr. Baron Clive held that such an acknowledgment could not amount to a promise to pay, when he insisted he was entitled to retain it, and directed the jury to find for the defendant. Neither do we understand how a promise to pay can be implied from an acknowledgment of the defendant of the receipt of the money, when he at the same time says the plaintiff has paid himself.

The terms of the acknowledgment must all be taken together, so that it may be seen whether, upon the whole, the party intended distinctly to admit a present debt or duty. 2 Greenl, Ev. 357.

The next is Cole *v.* Saxby, 3 Esp. N. P. 160. The proof was, the defendant said he would pay his part when he was able. Lord Kenyon held this to be a conditional promise, and that it was incumbent on the plaintiff to show his ability, and that it was sufficient to give evidence of ability from ostensible circumstances and appearances in the world.

In Wells *v.* Horton, 12 Eng. C. L. R. 186, also referred to, the defendant's testator was in his life-time indebted to the plaintiff, and he stated to plaintiff's attorney that he had made provision by his will, and had directed his executors to pay it at his death. He died without making such provision. Held that the promise was good, and that the statute of limitations did not apply.

Clark *v.* Hougham, 9 Eng. C. L. R. 49, shows that an express promise is not necessary, but may be implied from an acknowledgment.

12 Wendell 490 is not a case under the statute, but one where the question arose as to what is sufficient at common law to rebut a presumption of payment arising from lapse of time. We think it a mistaken view of the statute to suppose it was only intended to limit and fix the period when, from lapse of time, a court would presume payment.

Mosher *v.* Hubbard, 13 John. Rep. 512, was a case where there was evidence of the admission of the debt, being the amount of an order drawn by the defendant in favor of the plaintiff on a third person more than six years before, and which he admitted had not been paid.

Montgomery *v.* Hernandez, 12 Wheaton 129, is referred to to show that any delay occasioned by the debtor suspends the statute. The language of the court is, "The right of action was suspended during the pendency of the appeal in this court, and during such suspension the statute of limitations did not run against him." The action was upon a marshall's bond, to recover the proceeds of a vessel and cargo sold by him under an order of the district court. The law directs the money to be deposited in the name and to the credit of the court, and provides that money so deposited shall not be drawn out of bank without the order of the court. The court say, "It was only a partial execution of the precept of the court to sell the vessel and cargo; its mandate was not faithfully performed until the proceeds were brought into court by him, in order to be deposited according to law, or until he paid it over to Hernandez as directed by the final decree of the court. The marshall's failure to bring in the money or to pay it over to Hernandez & Co. was a violation of his duty and a breach of his bond."

"The supreme court of the state (Louisiana) decided, that although the breach of the condition of the bond took place more than six years before the institution of the suit, yet the plaintiff's right of action did not accrue until within the six years. This court perfectly accords in opinion with the supreme court of the state."

This fully explains what is meant by the right of action being *suspended*.

Next comes Webber *v.* President of Williams College, 23 Pick. 302. The action was upon a promissory note. The defendant, before the expiration of six years from the time the debt accrued, proposed to the plaintiff, that if he would forbear bringing his action at that time, he should continue to have the same rights, for one year more, that he then had. The plaintiff answered that he would not consent thereto; but did not, in fact, commence his action until the six years had expired. Upon these facts Ch. Jus. Shaw says: "The court are of opinion that this was a sufficient compliance with the defendants' offer; that they are bound by it, and that it is a good waiver of the statute of limitations." And this is all that is said. Whether the court held this to be sufficient evidence of a new promise, or upon what principle the point was thus decided, does not further appear, though we suppose upon the ground of the agreement by the plaintiff not to avail himself of the statute. The case was decided against the plaintiff upon another point.

In Mathews *v.* Philips, 2 Salk. 425, it is determined that the commencement of an action in an inferior court will prevent the statute from attaching. So, too, the commencement and continuance of a suit in K. B. will save a case out of the statute in a proceeding in bankruptcy. 7 Eng. C. L. R. 415. So, too, the issuing and return of a writ *non est inventus*, is sufficient to avoid the statute. 2 Burr. 950. It shows that the plaintiff had rightfully and legally pursued his right. But we see no analogy between these cases and a case where the statute begins to run from the date of the judgment, and the plaintiff has pursued no remedy *by suit*, but only by taking out execution. If he is unable to collect on execution, he must take care and renew his judgment by suit before the statute attaches.

In Wilcocks *v.* Huggins, 2 Stra. 907, the question was, within what time an executor of an executrix should bring an action after her death, she having commenced a suit which was pending when she died, and the six years having then expired. It was held that four years was too long a delay. The court say, if the second executor had been retarded by suits about the will or administration, and had shown it in pleading, it would have been otherwise, because then the neglect would be accounted for. The court also say, the most time that had ever been allowed is a year, and that within the equity of the statute, which gives the plaintiff a year to commence a new action where the judgment is arrested or reversed, but said they would not go a moment further, for it would let in all the inconveniences the statute was intended to avoid.

We have already shown, that the only question in such case is, whether the second suit is brought within a reasonable time, and that by analogy the statute is the best guide on the subject. This only applies to a case where the party has himself commenced a suit, which has failed from some cause beyond his control.

We are referred to Brown's Executors *v.* Putney, 1 Wash. R. 302. Counsel for defendant argued, that the clause in the act of limitations which allows the plaintiff one year to re-commence his action, is extended by an equitable construction to all cases where the *plaintiff gets out of court.* Counsel in that case were mistaken, or we are, as we have shown. Wilcocks *v.* Huggins is referred to by the court, and one year recognized as the time within which the suit must be brought.

In 8 Vt. Rep. 90, it is said the statute does not run upon a judgment while the judgment debtor is imprisoned on the execution, but begins to run from the time of his discharge by taking the poor debtor's oath. We have not the case, but the obvious reason we suppose for this is, that the right of action does not accrue until the defendant's discharge.

Wilson *v.* Koontz, 7 Cranch 202, is a case in which the only question was, at what time the right of action accrued.

In Pendleton *v.* Phelps, 4 Day 476, the statute was held not to have run upon petitioner's demand against the estate of a deceased partner, because it was not a *claim* against the estate until after the insolvency of the survivor, within the meaning of the statute of Connecticut requiring the *claims* of certain creditors to be exhibited to executors within two years. The right of action had not accrued until the insolvency, which was within two years.

We have thus, as fully as was in our power, considered all the points made by the plaintiff in favor of his replication.

The facts stated neither show that the plaintiff was under any of the disabilities mentioned in the statute, nor that the defendant had either expressly promised to pay the debt, or had made such an acknowledgment as contained an unqualified and direct admission of a present subsisting debt, which he was liable and willing to pay, or that he had waived the benefit of the statute.

There is no pretence that there was any fraudulent concealment of the cause of action by the defendant.

We think the defendant entitled to judgment on the demurrer, and direct that it be so certified to the circuit court for the county of Wayne.

Certified accordingly.

Crane v. Hardy.

Whether in ejectment for land purchased at sheriff's sale by one not a party to the execution, it is necessary to prove the judgment on which the execution was issued. Query.

The journal of the court, in which its judgments and all its proceedings are entered from day to day, and signed by the court, is sufficient evidence of a judgment.

A warrant of attorney and plea of a defendant taken from the files in the case, is evidence, in the same court, of the appearance of the defendant in the suit.

By appearing and going to trial in an attachment suit, defendant waives all prior irregularities.

An order made by the court, under R. S. 1838, for the sale of real estate taken in an attachment suit, goes to the sheriff in office for the time being, and not to his predecessor who served the writ of attachment.

The court will presume the law of a sister state is the same as that of their own state, unless the contrary is shown.

A judgment is not a contract within the inhibition of the constitution of laws impairing the obligation of contracts.

To pass the title to real estate sold on execution under the act of 1841, it is not necessary it should appear from the officer's return to the execution, that either of the appraisers was chosen by defendant, or that he had an opportunity to choose one.

The settled doctrine as to sales under decrees and judgments is, that the purchaser is not concerned with anything except the judgment, levy and sale. All other questions are between the parties to the judgment and the officer making the sale.

Case reserved from Livingston Circuit Court. Ejectment for land purchased by plaintiff on the 13th July, 1841, at sheriff's sale, upon an order granted by the circuit court of that county, in a suit in attachment, in which Oliver P. Thayer was plaintiff and Hardy was defendant. On the trial, plaintiff did not produce any formal record of the judgment in the attachment suit, but to prove the judgment, offered the journal record of the court, in which its proceedings are entered from day to day in evidence, which was objected to by defendant. To show defendant appeared in and defended the attachment suit, plaintiff offered in evidence, from the files of the case, the warrant of attorney and plea of the defendant, which were also objected to by defendant. Plaintiff also offered in evidence the order of sale in the attachment suit, with the sheriff's return, which defendant objected to on the ground, 1st, That the sale and return were not made by the officer who served the writ of attachment, but by his successor in office; 2d, That the land should not have been appraised under the act of 1841, but should have been sold at public vendue to the highest bidder, according to the laws of the state on the 6th January, 1837, the date of the note on which the judgment was rendered in the attachment suit; 3d, The sale was not in conformity with the laws of the state in force at the time of the rendition of the judgment, which was in November, 1840; 4th, It is not stated in the return the land was sold for the highest bid, or to the highest bidder. The sheriff's deed to plaintiff, of the land in question, was next offered in evidence by plaintiff, and objected to by defendant. The objections were severally overruled by the court, and the evidence allowed to go to the jury, and exceptions were taken by defendant in each case. The attachment suit was on a promissory note made in the state of New York, payable generally, and at no particular place. Defendant also requested the court to charge the jury, that the plaintiff must show the regularity of all the proceedings in the attachment suit, from the commencement thereof to the rendition of the verdict. Also, that the sale was insufficient, under the act of 1841, because it did not appear the appraisers were chosen in accordance with that statute; that is, it did not appear the defendant, or any one chosen on his behalf, appeared or was requested to appear and select an appraiser. The court refused to give the instructions, and defendant excepted. The jury returned a verdict for the plaintiff, and a case presenting the above questions was made and reserved for the opinion of this court.

Kingsley & Morgan, for plaintiff.

Hawkins, for defendant.

By the court, WING, J. It is difficult to determine whether it was incumbent upon the plaintiff in this suit to show, in addition to the order of sale and his deed, that there was a judgment upon which the order was founded. It is true, as a general proposition, that in cases where the proceedings are not according to the course of the common law, the party seeking any benefit from them is bound to show their conformity to the statute under which they are had.

Assuming, for the present, that the proceedings in the case of Thayer v. Hardy were, so far as the rights of the defendant in this suit are in question, according to the course of the common law, the authorities do not agree as to the necessity of showing a judgment.

Mr. Greenleaf, in his second volume upon evidence, sec. 316, states the rule to be, that "where a plaintiff claims as a *purchaser under a sheriff's sale*, made by virtue of an execution *against the defendant in ejectment*, it is sufficient to show the execution and the proceedings under it, without producing a copy of the record of the judgment itself; for the debtor might have applied to have the execution set aside if it had been issued without a valid judgment to support it; but not having done so, it will be presumed, in an action against him, that the judgment is right." He cites 6 M. & S. 110; 5 Esp. Rep. 22, 23; and 3 Wash. R. 546; but he says this point was otherwise decided, and the judgment was required to be proved in an ejectment against the debtor himself, in Doe *v.* Smith, 1 Holt's Cases 599, n.; 2 Starkie's Rep. 199, n.; and 1 H. & Gill 172.

Judge Cowen, in his notes to Philip's Evidence, pp. 1080, 1081, cites many American authorities and some English authorities to show that plaintiff is bound to produce a judgment, on the ground that otherwise the defendant's property might be divested when in fact there was no judgment, or only one utterly void; and therefore he must show such a judgment as at the least would be valid until reversed, though he cannot be affected by any mere irregularity either in the judgment or execution, not rendering them entire nullities.

Without attempting to determine which is the true rule and which best accords with the analogies of the law, if we concede for the purposes of this case that it was necessary for the plaintiff to show a judgment, was the proof of the judgment offered by the plaintiff admissible?

It is a general rule, that if a plaintiff brings suit upon a judgment, he must produce in evidence a judgment record, not only to support the allegations in his declaration, but because his action is founded directly upon the record of a judgment which he avers to be still in full force and unsatisfied.

In England and in New York the judgment record or roll is made up by the attorney of the party recovering judgment. The short minutes of the proceedings in the cause, kept by the clerk, do not set forth at large the orders and judgments of the court, and they are not signed by the judge. They are only intended and are used as a guide in making up the judgment roll, which is not a transcript of the minutes and the pleadings. This roll, when made up by the attorney with the form of a judgment, is signed by the judge and filed with the clerk. When this is done, and not until then, is there any judgment rendered upon the verdict of the jury, upon which an execution can issue.

In this state, all the orders made and judgments rendered in a cause by the court are entered at large upon the journal. By R. S. 1838, page 382, sec. 7, this is required to be done each day, and this journal is required to be signed each day by the court. The judgment record is a mere transcript of the "writ, pleadings, proceedings and judgment." R. S. 1838, p. 410, sec. 10. Within twenty-four hours after judgment is entered, or immediately thereafter by order of the court, execution may be issued and levied upon property, and the property be sold without any other record of the proceedings or judgment. R. S. 1838, p. 451, sec. 5.

If, then, the judgment so recorded and signed in the journal of the court is sufficient to warrant the issuing of an execution and a levy and sale of property, I cannot perceive why it is necessary for the purchaser to show a more formal judgment to sustain his purchase than would be necessary to authorize the sale; for the validity of the sale does not depend upon records afterwards made up, but upon a then existing authority derived from a judgment and execution. The judgment comes in question collaterally—the suit is not brought upon it; it is a judgment entered in the same court. The journal entry or judgment, together with all other interlocutory judgments or orders, with the pleadings in the cause, are before the court and may be inspected by them.

The defendant insists, that as the plaintiff claims through a proceeding not according to the course of the common law, he is bound to show that the whole of the proceedings were in conformity to the statute. It was admitted that the suit in attachment was brought upon a note of hand for some $250. To show that the defendant appeared in that suit, plead and went to trial, the plaintiff produced from the files of the case in the same court his warrant of attorney and plea. I cannot see how it should have been necessary for the plaintiff to produce a judgment record to enable him to do this. He had already produced the record of the judgment in the journal, and his only object further was to show that the defendant appeared in that cause, and this was shown by the original warrant of attorney and plea, and I think they were admissible for that purpose. 5 Yerg. R. 63; 14 Serg. and Raw. 153; Cow. and Hill's Notes 1075. This being shown, it appeared affirmatively that the parties and the subject matter of the suit were within the jurisdiction of the court, and in reference to any further obligation on the part of the plaintiff to produce proof, the case stood upon the same footing with any common law suit where the defendant appears and goes to trial. It does not appear defendant released the attachment by giving security under the act of 1839.

By appearing and going to trial, the defendant waived all irregularities which may have existed or accrued in the cause, and if not, the proceedings are valid until set aside. They cannot be collaterally impeached: they conclude all persons unless annulled. 3 Cow. and Hill's Notes, 803. If, in point of fact, the court had not jurisdiction, the defendant might have shown it, and it would have rendered the judgment *void for every purpose.* 19 John. R. 33; 9 Cowen 230. But the defendant does not point to any defect of jurisdiction; he insists that the plaintiff must show affirmatively that the court had jurisdiction.

The next objection was, that the sheriff who attached the lands did not sell them, but that the sale was made by his successor in office. The act, Laws 1833 p. 889, sec. 4, provides that "all the property attached shall remain in the hands of the officer, unless the garnishee in whose possession it may be found shall give bond to the officer." By section 11 of the same act it is provided, that after judgment for the plaintiff in attachment, all the property remaining in the hands of the officer, *with the lands and tenements*, shall be sold under the same restrictions and regulations as if the same had been levied upon by execution. The attachment suit was commenced under the act of 1833, in July, 1838. The Revised Statutes took effect before the return day of the writ, but there is no difference between the attachment law of 1833 and that of 1838 in respect to the duties and obligations imposed upon the sheriff, except that the laws of 1838 require the sheriff to leave a copy of his writ in the register's office for record. The laws of 1833 do not direct what sheriffs shall do with writs in their hands when they go out of office. By the Revised Statutes of 1838, p. 46, sec. 48, the outgoing sheriff is bound to serve, execute and return any writ or precept in his hands the same as if he continued in office. Under the attachment law, the writ does not remain in his hands: it is returned at the next term after it is issued, and after it is returned the clerk makes out an advertisement. If any of the personal property is sold before final judgment, a special order is made for that purpose, and the sale is made by virtue of the order. Neither the laws of 1833 or 1838 require the sheriff to take the actual custody of lands attached. He is required by both laws to retain the goods attached, and after judgment for plaintiff, "all the property remaining in the hands of the officer, *with the lands* *and tenements*," are to be sold. I cannot find anything in the laws relating to writs in the hands of the sheriff when he goes out of office, which would require that the final order of sale in cases where lands only were attached should be directed to or executed by the sheriff who served the writ of attachment, if he is out of office.

The case of the American Exchange Bank *v.* the Morris Canal Banking Company, 6 Hill's R. 368, is cited by defendant's counsel in support of his objection. In that case the suit was against a foreign corporation, under a special statute requiring the sheriff to *attach and safely keep* all the *estate real and personal* of such corporation, to answer any judgment recovered. There are many provisions in that statute indicating that the same sheriff should finally sell. By the laws of New York, the former sheriff is required to deliver to his successor in office all executions, *attachments*, and final process, except such as the former sheriff shall have executed or shall have begun to execute by the collection of money thereon, or by a levy on property in pursuance thereof. He is authorized to proceed and complete the execution of all final process and *attachments* which he shall have begun to execute by a collection of the money thereon. It is manifest the laws of New York and of this state are very different, so much so that the case cited, founded upon a special statute, cannot be an authority in this case. The practical construction of our laws has been for very many years to direct the order of sale of real estate to the sheriff in office for the time being. The order is general, not directed to any particular officer.

It is further objected, that the proceedings and sale by the sheriff were not according to the laws of New York, where the note was made on which the attachment suit was commenced, nor pursuant to the laws of this state at the date of the note in 1837, or at the time the judgment was rendered.

It was said in the case of McCracken *v.* Hayward, 2 Howard's R. 612, that "the obligation of a contract consisted in its binding force on the party who makes it. This depends upon the laws in existence when it is made. They are necessarily referred to in all contracts, and form a part of them as the measure of obligation to perform them by the one party and the right acquired by the other." The doctrine asserted in that case and in the case of Bronson *v.* Kinzie, 1 Howard's R. 311, applies to laws in reference to which the contract is made, and forming a part of the contract. In this case the note was made in the state of New York in 1837. No place of payment was specified in the note. What laws, then, were incorporated into and formed a part of the contract? It cannot be assumed that it was made in reference to the laws of this state. If not, how can it be said that the laws of this state in force in 1837 must govern and furnish the remedy upon the contract? If the laws of New York were to govern, what were they? They were not produced in evidence on the trial, and therefore the court could not notice them, if obliged to do so under any circumstances, any further than as a means of understanding the obligation of the contract, and not the remedy merely. The court would presume that the laws of New York were the same as ours, at the least until the contrary was shown. The court and the sheriff could only notice the laws of this state at the time they were required to give judgment and sell the property. It is not pretended there was any difference between the laws of that and of this state in regard to the effect to be given to the terms of the contract. The difference was claimed to be in the remedy afforded by our laws.

But it is said the judgment is a new contract, and the subsequent proceedings are to be governed by the laws in force when the judgment was rendered. If the legal effect of the judgment was to connect with it the then existing legal provisions for its enforcement in this state, then the position of the defendant would be sound. But the judgment was not a contract within the meaning of the rule quoted above, for the rule has relation to the voluntary contracts of the parties, and not to obligations forced upon either party. The law in force at the time of a sale of land upon execution must control the manner of proceeding by the officer in conducting the sale, and not the law in force at the time of the rendition of the judgment, except in those cases specially provided for by the statute, (Allen *v.* Parish, 3 Ohio R. 189) unless they interfere with the contract, as in the case of Mc Cracken *v.* Hayward.

It is further objected, that the appraisers were not chosen pursuant to the law of 1841, under which the sale purports to have been made, and that it does not appear by the return that the lands were sold to the highest bidder.

The first section of the *appraisal* law, so called, passed the 27th

March, 1841, provides that no sheriff, officer, or other person shall make sale of any lands, tenements, or real or personal estate upon any execution, attachment or other process, until the same be appraised by disinterested freeholders, as provided in said act. The third section requires the sheriff, at the time of levy of execution, or at the time of making sale, to cause the lands to be appraised by disinterested freeholders; *provided*, however, that the creditor, his agent or attorney, and the debtor, his agent or attorney, if they shall so elect, may choose each party one appraiser, and if said appraisers shall not agree in their appraisal, they may select a third person to act with them; but if they shall fail to select, then it shall be the duty of the sheriff to select and appoint said third person. There is another proviso which prohibits a sale of the premises at less than two thirds of the appraised value. The officer is directed, within ten days after such appraisal, to file in the clerk's office from which the process issued, a statement of the appraisal, signed by the appraisers agreeing thereto, and the person making the sale is directed forthwith to execute a deed of the real estate sold, to the purchaser, which may be recorded, "*and shall be prima facie evidence of the correctness of the proceedings in such sale, and, until the contrary is proved, shall vest in the purchaser the estate the defendant had in the premises.*"

By the amendatory act of the 13th April, 1841, some few alterations were made in this law, by one of which, the deed given by the sheriff was not to be operative until after six months. The other amendments do not affect the question we are now considering.

The purchaser, the plaintiff in this suit, received from the sheriff a deed. We have already said that the sheriff was authorized to act, to make the sale and give the deed. Unless his acts were void for want of conformity to the statute, the deed was valid.

The several acts passed in 1841 do not direct what shall be embraced in the sheriff's return, if the property is sold within the life of the execution, further than that he shall return a statement of the appraisal, and file it in the office of the clerk.

The sheriff returned that he had caused the land to be appraised according to law. There is nothing in the return indicating that the sheriff chose the appraisers, but the objection is, that it does not appear affirmatively that either of the appraisers was chosen by the defendant, or that he had an opportunity to choose one of them. The sheriff is not required by the statute to set forth all his proceedings in detail in his return, and there is no express provision making the title of the purchaser dependent upon the return of the sheriff. The settled doctrine as to sales under decrees or judgments is, that the purchaser is not concerned with anything but the judgment, levy and the sale. All other questions are between the parties to the judgment and the officer making the sale. Wheaton v. Sexton, 4 Wheaton 503. In Armstrong v. Jackson, 1 Blackford 210, the same doctrine is declared in the following language: "It is a fair presumption that the judgment of a competent court, which a *bona fide* purchaser sees of record, has been correctly rendered, and that the execution shown him in the hands of the sheriff has been regularly issued. It may be safely presumed, too, that the sheriff has done his duty, in obeying the directions of the statute, as it respects the inquest and the advertisement of sale, &c. It is important to the interest of both plaintiffs and defendants, that the title of a bona fide purchaser at sheriff's sale should not be affected on account of any irregularity in the judgment or execution."

Decisions of the courts of New England have been cited to show that any failure on the part of the sheriff to pursue the directions contained in the statute will render his proceedings void; and that the regularity of his proceedings must appear in his return. In those states the debtor's land is not sold. It is set off to the creditor after appraisal. The sheriff makes a return of his proceedings, including the appraisal, and this is to be recorded in the register's office within three months. It has been held under those statutes, that it must appear by the sheriff's return that the debtor had an opportunity to choose an appraiser. 2 Mass. 154; 8 id. 284: 17 id. 299; 12 Pickering 47; 3 N. H. Rep. 317; 6 id. 306. Those proceedings are similar to an extent upon an elegit in England. In the case of Jackson v. Sternbergh, 1 John. Cas. 153, the plaintiff in ejectment offered in evidence the judgment and execution. It did not appear by the return of the sheriff on the execution, that he had pursued the directions in the statute. The court say the return of the sheriff is not essential to the title of the purchaser. That title was not created by, nor is it dependent upon the return, but was derived from the previous sale made by the sheriff by virtue of the writ. It was sufficient for the purchaser that the sheriff had competent authority, and sold and executed a deed to him. Proceedings upon an elegit do not apply to the writ of fieri facias. On an elegit no sale can be had, but the sheriff takes an inquisition by a jury, who set off a moiety by metes and bounds. It is necessary to return the inquisition, which, with the sheriff's return, constitutes the title. Here the sale and the sheriff's deed are sufficient evidence of the title; and if the purchaser can shew that the sheriff has authority to sell, it is enough, and he need not look further.

Under the New England statutes, no deed is given. The doctrine of the common law applies here, unless the statute has changed it. Our statute is substantially the same as the Ohio statute. In the year 1828, this precise question came before a full bench of the supreme court of that state for the first time, in the case of Allen *v.* Parish, 3 Ohio R. 187. It was an action of ejectment. The defendant gave in evidence certain judicial proceedings, by virtue of which the land was sold by the sheriff. There was no appraisal of the land sold recited in the sheriff's deed, or proved at the trial, and the question was, whether the appraisement was essential to the validity of the deed. The court held, (Judge Burnett dissenting) that the sheriff's deed would vest in the purchaser, not being a party to the judgment, a good and valid title to the lands levied upon by and sold under the execution, although no appraisement of the premises had been made. They cite the case in 4 Wheaton 503; 2 Bibb 402; 3 id. 217; 8 John. R. 366; 16 id. 537; 2 Binn. 40; as asserting substantially the same doctrine. The court comment upon that part of the act which is our third section, and say that the proviso is in a section which is directory to the officer, and that if the appraisement was intended by the legislature as essential to the validity of the sheriff's deed, they would, it is presumed, have provided some mode of preserving the evidence of the appraisal for the benefit of the purchaser, and have incorporated the proviso into that part of the statute declaring the effect of the sale of land on execution, and the extent of the interest acquired by the purchaser at such sale. There is no direction in our act to the clerk to record the appraisal. In Ohio the original inquest is delivered into the hands of the sheriff, for his security. A copy of it is delivered to the clerk, not upon the return of the execution, but before the advertisement, that all may examine it and regulate their conduct accordingly. The court in Ohio refer to the fact that the sheriff is liable to a penalty if he does not pursue the statute. Our Revised Statutes of 1838 contained the same provision in reference to advertising, and declared the sale good if the sale was not advertised, thus adopting the common law principle. But it is apprehended our statute does not reach proceedings under the act of 1841, except perhaps so far as relates to advertising. Under the Ohio statute, the defendant has an opportunity to get an order staying proceedings, if there is any irregularity in the sheriff's proceedings, before sale. One of the objections to the proceedings in the case cited, made by Judge Burnett, was the prohibition to sell for less than two thirds of the appraised value. He looked upon this as a condition precedent, a compliance with which was essential to vest the title in the purchaser. The majority of the court refer to a provision of the law equally express, requiring the officer, before he proceeds to sell, to advertise, and yet they say it was never held in their state that a failure to show that the property was advertised, would defeat a purchase at sheriff's sale.

The Ohio statute declares that the deed given "shall vest in the purchaser as good and perfect an estate in the premises therein mentioned, as was vested in the defendant at the time the lands became liable to the satisfaction of the judgment." Our statute goes further, and expressly declares what effect shall be given to the deed to the purchaser. It provides that the deed *shall be prima facie evidence of the correctness of the proceedings in such sale, and until the contrary be proved shall vest in the purchaser as good and perfect an estate to the described premises as was vested in the defendant in process.* This clause is contained in the same third section which contains all the directions relating to the appraisal and sale, and it manifestly shows the intention of the legislature to have been, that a compliance with the various provisions in that section should not be considered as a condition upon which the title was to vest, at least until the proceedings were shown to be bad. It shifts the burthen of proof, and requires the defendant to show affirmatively that the statute was not pursued.

The sheriff has returned, that he "caused the lands to be appraised according to law, by" &c. This should be received as evidence that the sheriff did comply with the first section of the act, if this is necessary. That the appraisers were *chosen* according to law, will be presumed until the contrary is shown. In the case of Piatt v. Piatt, 9 Ohio R. 37, the sheriff returned that he "had duly appraised, advertised," &c. On a contested motion to confirm the sale, this was deemed a sufficient return upon an execution, of an appraisement by three disinterested freeholders, in the absence of any proof to the contrary. The court say, it will be presumed the appraisal has been returned, because the law requires it of the officer, and in the absence of anything to the contrary, he will be presumed to have done his duty.

Certified accordingly.

MUNDY v. MONROE.

An affidavit of publication of notice of sale of mortgaged premises in a statutory foreclosure, made between seven and eight years after the sale took place, is not presumptive evidence of the facts therein stated, under sec. 9 R. S. 1838, p. 501.

The act, Ses. L. 1843, p. 189, inhibiting actions of ejectment by mortgagees before foreclosure of the mortgage and the expiration of the time of redemption, is unconstitutional and void as to mortgages in existence at the time of its passage.

CASE reserved from Jackson Circuit Court. Ejectment for lots 3 4, 5, and a part of 6, in the village of Jackson, tried before the Hon. Warner Wing, in May, 1846. The facts are stated in the opinion of the court.

Mundy, in person.

Frink, for defendant.

By the court, MILES, J. The plaintiff held a mortgage for a portion of the purchase money, on a sale of the premises to one Paul B. Ring, under whom the defendant claims title.

On the trial, the plaintiff, to establish a statute foreclosure of this mortgage, offered in evidence an affidavit of the publication and posting up of a notice of sale, commencing in June, 1838, and continued for twelve weeks. This affidavit was made and sworn to in May, 1846. Its reception as evidence was objected to by the defendant.

By the consent of the defendant, a verdict was taken for the plaintiff, subject to the opinion of this court upon the admissibility of this evidence, and upon other points raised on the trial, all of which have been certified to this court, but none of which except the above, and one which we shall hereafter notice, are necessary to be considered.

First, as to the admissibility of the affidavit as evidence of the publication and posting of the notice.

The statute in force at the time of the sale, R. S. 1838, p. 500, sec. 8, provides that any party desirous of perpetuating the evidence of any sale made in pursuance of the provisions of that chapter, may procure affidavits of the publication of the notice, to be made by the printer of the newspaper in which the same is published, or by any other person having knowledge thereof, and of the posting of the notice to be made by the person who affixed the same on the outward door of the court house, and an affidavit stating the circumstances of the sale of the premises, to be made by the person who acted as auctioneer at the sale.

These affidavits are, by the 9th section of the act, required to be recorded in the book of mortgages, in the registry of deeds in the county where the mortgaged premises are situated; and the original affidavits "so recorded," or the record, or certified copies, are made presumptive evidence of the facts therein contained.

The statute introduces a new rule of evidence. It is an extension of the general act authorizing a party to perpetuate the testimony of his witnesses. R. S. 1838, p. 435, sec. 31. The 35th section of the last mentioned act allows the deposition to be used only in case "the personal attendance of such witness cannot be had within process of the court."

Although the statute allows these recorded affidavits to be presumptive evidence of the facts contained in them, it cannot be construed to exclude other evidence of the same facts. The object of the law undoubtedly is, while the facts are fresh in the recollection of the witnesses, to preserve a perpetual remembrance of the thing, thus avoiding the danger of loss of the evidence from defects of memory on the one hand, and of perjury on the other, at a subsequent period, when litigation in reference to the subject matter may make such evidence important.

These affidavits may not be necessary at the time of the sale, or perhaps not until the time of redemption, if any, has expired. But when the purchaser has ascertained that he has acquired a title, he should at once take the necessary steps under the statute to preserve the evidence of that title.

It is true the statute does not prescribe any time within which this is to be accomplished, neither do we: it is sufficient that this court see that the statute receives such a construction as that it shall not be the means of oppression, fraud or injustice.

If the party chooses not to avail himself of the benefit of the statute, but to prove the facts of the sale necessary to his title in the ordinary mode, he subjects his witnesses to the ordeal of a cross examination by which every particular in relation to the regularity and sufficiency of the proceedings may be tested.

Can it be supposed that it was the intention of the legislature to allow a party claiming title under a statutory mortgage sale, after the lapse of eight years, and after suit commenced, to procure an ex parte affidavit of these facts, and use that as the only evidence of the publication—thus dispensing with the rule of evidence requiring a careful examination of the witness in open court, and allowing the opposite party the opportunity of a cross examination?

We think such a course, if tolerated, might lead to great abuse of the statute. This makes it necessary to consider the next point.

The plaintiff insisted, upon the trial, that if the sale was irregular, he was still entitled to recover, under the testimony showing that he was a mortgagee of the premises, and that the act of 1843, Ses. Laws 1843, p. 130, inhibiting the action of ejectment until after a foreclosure of the mortgage and the expiration of the time of redemption, was void, as impairing the obligation of the contract, the mortgage being of a date anterior to the act.

It is not distinctly stated, but we gather from the case certified, that the mortgage contained the usual covenant by which the mortgagee, in default of payment, was authorized to enter upon the premises and to sell them at public auction; to retain out of the money thus raised the amount due, and to pay the overplus, if any, to the mortgagor.

The mortgage was executed within this state, upon premises situated here; was intended as a security for the payment of $1500, in three instalments of $500 each, all of which had become due at the time when the act of 1843 was passed, and before the suit was commenced.

The plaintiff insists, that the legal title having vested in him, upon forfeiture by the mortgagor, he had the right to the possession, and the consequent right to the perception of the rents, issues and profits, and that the act of 1843 hinders and affects that right.

It seems to be conceded by all who have written on this subject, that where the law sought to be invalidated affects the remedy only, and does not touch the right of the party secured by the contract, it is not repugnant to that provision of the constitution which declares that no state shall pass any law impairing the obligation of contracts.

In the case of Sturges *v.* Crowninshield, 4 Wheaton 200, so often referred to upon questions of this kind, the late Chief Justice of the U. States says, "the distinction between the obligation of the contract and the remedy given to enforce that obligation, has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

It becomes important, then, to inquire what rights were conferred upon the plaintiff by this mortgage.

In Jackson *v.* Hull, 10 John. R. 481, it was held, that after default in payment, the mortgagor had only an equity of redemption in the premises; that a purchaser upon execution against him, buying with knowledge of the mortgage unsatisfied, could not defend against an ejectment brought by the mortgagee to recover the possession.

The doctrine is clearly laid down in this case, that after default in payment, the creditor may by ejectment put himself in possession of the rents and profits of the land. 4 John. R. 216.

A tenant of a mortgagor in possession, after the mortgage has become forfeited, during the continuance of the lease from the mortgagor, may attorn to and take a lease from the mortgagee, and in an action brought by the mortgagor for his rent under the lease, may set up such attornment as a legal defence. 20 John. R. 51. A widow of the grantee in a deed cannot claim dower in the premises, if a mortgage is at the same time given for the purchase money. Stow *v.* Tifft, 15 John. R. 458.

In Hughes *v.* Edwards, 9 Wheaton 489, it is asserted that the mortgogor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest, and that his conveyance to a purchaser, with notice, of consequence passes nothing but an equity of redemption.

In equity, a mortgage is sometimes called a lien for a debt, and so it is, and something more: it is a transfer of the property itself, as security for the debt: it is a qualified estate and security. It is called a lien only in a loose and general sense, and then only by way of contrast to an estate absolute and indefeasible. 1 Peters 441.

Lastly, it is said by Mr. Justice Story, in 1 Howard 318, that according to the long settled rules of law and equity, in all of the states whose jurisdiction has been modeled upon the principles of the common law, that the legal title to the premises vests in the mortgagee, upon the failure of the mortgagor to comply with the conditions contained in the proviso, and at law he has a right to sue for and recover the land itself.

We recognize this right in a mortgagee. In the case before us, it had become absolute before the statute in question was passed, and if it is a part of the contract between the parties, and the statute infringes upon it, the latter is unconstitutional.

It seems to us this right is a part of the contract itself. The contract includes a conveyance, by way of mortgage, of the premises in question, upon the performance of the condition of which, the property revests in the mortgagor, and upon failure of performance of which condition, the legal title is vested in the mortgagee, subject only to an equitable right of redemption upon payment.

By the common law, a right to land includes the right to enter on it where the possession is withheld from the right owner; to retain the possession, and to receive the issues and profits arising from it. Altham's Case, 8 Co. 299, referred to in Green v. Biddle. 5 Peters' Cond. R. 381.

Besides, there is in this case an express covenant in the deed to that effect, that upon forfeiture the mortgagee might enter into possession of the land, and sell the same to make the money. This covenant contains both a recognition of the legal right of the plaintiff, by the obligation of the contract, to the possession of the premises after non payment, and also an authority to him to pursue a particular remedy to enforce that right, by advertisement and sale. This right existed, and became perfect as soon as the condition of the mortgage became forfeit; and any legislative proceeding which hinders the assertion of the right, and seriously affects it, affects the obligation of the contract.

By the non payment of the money, the plaintiff acquired the right of possession, the withholding of which by the mortgagor is in law an injury to the right of the plaintiff, who is entitled to assert his right by an immediate pursuit of the proper remedy.

In Green v. Biddle, it is said, "nothing can be more clear upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to and interest in the property."

The situation of mortgaged premises may frequently be such as to make the mere suspension of the exercise of the right of possession a great injury to that right, as in a case where the principal value of the premises consists in buildings or other improvements made thereon, subject to destruction, or to a depreciation in value by long use.

The mortgagee, if put in possession, may apply the issues and profits in payment on the mortgage, and is required to account therefor. The mortgagor, if permitted to remain in possession, may or may not appropriate them to that purpose, at his option.

Where the premises, which is not unusual, are in the first instance a slender security for the debt, by depriving the mortgagee of the right to immediate possession, his security may be so far lessened and reduced in value as to leave little more than enough to pay the expenses of a foreclosure and sale.

In Green v. Biddle, the main question discussed and decided was, whether certain acts of the legislature of Kentucky, in relation to occupying claimants of lands in that state, passed severally in 1797 and 1812, were unconstitutional if found repugnant to the laws of Virginia passed in 1789, prior to the separation of Kentucky from that state.

The seventh article of the compact made between these states, upon the separation of the latter from the former, declares, "that all private rights and interests in lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state (Kentucky), and shall be determined by the laws now existing in this state," (Virginia).

The court having first determined that every part of the act of 1797 was within the purview of the act of 1812, and consequently repealed by the repealing clause in the latter act, proceeded first to inquire whether that act was repugnant to the law of Virginia as it existed at the time the compact was made. They declare that the common law of England was at that period and then was the law of that state, and refer to the rule of that law as laid down in Altham's Case, to which we have already referred; and then proceed to state that a right to land essentially implies a right to the profits accruing from it, since without the latter, the former can be of no value. Thus a devise of the profits of land, or even a grant of them, will pass a right to the land itself. Shep. Touch. 93; Co. Lit. 46. "For what" says Lord Coke in this page, "is the land but the profits thereof?" They further state, that at the period of the compact there was no statute in Virginia less favorable to the rights of those who claimed title under her than the common law. After comparing the provisions of the act of 1812 with the provisions of the existing law at the period before mentioned, the court decide that the right and interest of a claimant were not as valid and secure under this act as they were under the laws of Virginia, by which alone they were to be determined. The court say, "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." The court next proceeded to determine that the act of 1812 was repugnant to the constitution of the United States, and to declare the same void, as impairing the obligation of the contract between Virginia and Kentucky; upon the principle that the constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a state and individuals, and that a state has no more power to impair an obligation into which she has herself entered, than she can the contracts of individuals.

I have made this extended reference to this case mainly for the purpose of showing that the act of assembly of Kentucky was held to be repugnant to the constitution of the United States, although we have been told by high authority, that "the question did not arise under that constitution, but under the compact." Dissenting opinion of Mr. Justice Mc Lean, in Bronson *v.* Kinzie, 1 Howard 328. It is true the question arose under the compact, but the act of 1812 being repugnant to it, impairing its obligations, was for that reason held unconstitutional.

A brief reference to some of the provisions of the act will show that, although they were in the form of remedy, they impaired the right. Among other things, the act provides that no action should be maintained for rents or profits against the occupier, for any term elapsed before the judgment or decree in the suit. It then provides for the appointment of commissioners to make a valuation of the land in its unimproved state, and of the rents and profits, and for the giving of a bond for the amount of the valuation by the party who is to pay the same, (it compelling the successful claimant to pay to a certain extent the assessed value of the improvements made on the land by the occupant), and in default thereof, provides that judgment shall be given against the party for the amount; or if the right owner fails to give a bond, the other party may at his election give a bond and take the land. It then proceeds to declare, *that the occupant shall not be evicted or dispossessed by a writ of possession, until the report of the commissioners is made, and judgment rendered, or bonds executed, in pursuance of the act.*

All this, though purporting to modify the remedy, is manifestly an infringement of the rights of the claimant, secured to him by the laws of the contract, and was so held by the court in that case, the court having determined, if we understand the opinion, that in all its provisions, the act of 1812 was obnoxious to the charge of repugnance to the law existing at the time of the compact, and necessarily to the charge of being unconstitutional.

The remedy may undoubtedly be modified, so far as the same may be done, "without impairing the obligation of the contract," and such we apprehend is the meaning of what is said in Sturges *v.* Crowninshield. Otherwise we fear the result would be, that by means of merely remedial alterations in name, the substantial rights of parties may be impaired, and the provision of the constitution be set at nought.

The object and intention of the statute of 1843 was to take away the right to possession until after a foreclosure and the expiration of the time of redemption; and any other merely possessory form of action than ejectment would be held to be, within the statute, as being within its equity and intention. By this act, the mortgagee is required to incur the additional expense of a foreclosure, before obtaining possession, and is deprived of the right to add to his security, by the perception of the rents and profits of the premises during the time required to accomplish this and the time of redemption, and during that time the rents and profits are given to another, who may or may not appropriate them to the payment of the debt, as he chooses, and the mortgagee in the mean time is subjected to the risk, often considerable, of the depreciation in value of the security. If the view which we have taken be correct, need it be asked whether the right and interest of the plaintiff in his security are as "valid and secure" under this act as they were under the law existing before its passage? We think it obvious, that however this may be looked upon as affecting the remedy, it does not affect that only. In Willard *v.* Longstreet, 2 Doug. Mich. R. 172, it was determined, on the authority of Mc Cracken *v.* Hayward, 2 Howard 608, and Bronson *v.* Kinzie, 1 Howard 311, that the provision of the act of 1841, Ses. Laws 1841, p. 45, secs. 1, 2, prohibiting the sale of property on execution unless it would bring two thirds of its appraised value, so far as it applies to the remedy to enforce previous contracts, is unconstitutional and void. The court say, "If there had been no sale or bid for two thirds the amount at which the premises were valued, they (the plaintiffs in the execution) might have insisted that the property should be sold absolutely to the highest bidder, irrespective of the appraisement; and if the sheriff had refused to sell, have applied to the court for an order upon him to do so, as was done in the case of Mc Cracken *v.* Hayward.

We are then led to the conclusion, that the act of the legislature is unconstitutional and void as applied to contracts existing at the time of its passage; and having come to this conclusion, we know of no other mode of discharging our duty than so to declare it.

The plaintiff is therefore entitled to recover, and we direct it be so certified to the circuit court.

Certified accordingly.

LULL ET AL v. DAVIS.

In an action on the case for flowing land, the declaration alleged plaintiff was lawfully seized in fee and possessed of the land flowed. *Held*, that the whole averment was material, and must be proved as stated. *Held*, also, that proof of plaintiff's possession under a claim of title founded upon a deed, not emanating from the source of title, or traced back to a person so claiming, did not raise a legal presumption of seizin in fee in the plaintiff; and further, that if such possession was evidence of seizin, it was at most but a bare presumption, liable to be overcome by other proof, as title in a third person.

ERROR to Oakland Circuit Court. Davis brought an action of trespass on the case in the circuit court, against Lull and others, for flowing land. The declaration alleged Davis was lawfully seized in fee and possessed of the premises flowed. Plea, general issue, with notice of a prescriptive right in defendants to flow the land in question. From the bill of exceptions accompanying the record, it appeared plaintiff, after giving evidence of the flowing, read in evidence two deeds, one from Gideon O. Whittemore to plaintiff, dated April 13, 1834, and the other from Luther Jones to plaintiff, dated January 25, 1839, each deed purporting to grant to plaintiff in fee a part of the premises, and together covering the whole of the premises described in the declaration. There was no evidence showing Jones' or Whittemore's title, or that they claimed the premises by deed from any one. It appeared, however, plaintiff had been in possession some ten years or more. Defendants, after giving evidence to prove the prescriptive right claimed by them, offered in evidence a deed of the premises from the United States to Stephen Mack, dated September 19, 1820, and a deed for the same from Mack to Solomon Sibley, dated September 20, 1822, and then proved the mill-dam, which occasioned the flowing, was built about the time the land was conveyed by Mack to Sibley, and had been occupied and used for milling purposes from that time down to the commencement of the present suit. The plaintiff then introduced a deed for one third part of the mill property, including the land flowed, from Sibley to Eurotas P. Hastings, dated April 12, 1830; a deed for two thirds of the same property from Sibley to Stephen Mack, dated November 12, 1822; a deed from Daniel Le Roy, administrator on the estate of Mack, to Hastings, dated July 3, 1830; and a deed from Hastings to Samuel C. Munson, for the whole property, dated July 13, 1831. These deeds were introduced by plaintiff to show a unity of possession in Munson of the mill property and land overflowed. Defendants asked the court, upon the evidence, to charge the jury the allegation in the plaintiff's declaration of seizin in fee was not sustained by the proof, and that they must find a verdict for defendants. The court stated to the jury, that if they believed the evidence in relation to the title and the possession, the allegation of seizin was sufficiently proved. Defendants excepted, and a verdict having been returned for plaintiff, and judgment rendered upon it, they sued out their writ of error.

C. Draper, for plaintiffs, in error.

Stevens, for defendant, in error.

By the court, WING, J. The objection to plaintiff's recovery assumes that the allegation contained in his declaration, that he is seized in fee and possessed, is a connected, entire statement, descriptive of a matter which is the foundation of the action; that it is so connected that no part of it can be stricken out or regarded as impertinent or irrelevant; and therefore, as the entire statement is traversed by the defendant's plea, the plaintiff must prove it as made.

The charge of the judge must be regarded as assuming, either that the averment was divisible, and that the first portion of it was immaterial, or that, for the purposes of this action, proof of possession was evidence of a seizin in fee in the plaintiff.

It is an established rule governing in the production of evidence, that the evidence offered must correspond with and support the averments in the declaration or plea. This rule supposes the averments to be material and necessary.

In 1 Chitty's Pleadings, 228, it is stated, that if a party take upon himself to state in pleading a particular estate, when it was only required of him that he should show a general or a less estate, title or interest, the adversary may traverse the allegation, and if it be untrue, the party will fail. Thus a general freehold title, *liberum tenementum*, may be pleaded either in trespass or in an avowry in replevin, and under it the defendant may prove any estate of freehold either in fee or for life; but if he state, though unnecessarily, a seizin in fee of a particular estate or interest, and the other side traverse the allegation, it must be proved as stated. This is an instance of material matter alleged with an unnecessary detail of circumstances or particularity. The *subject matter* of the averment is material and relevant, and the evil is, that the essential and immaterial parts are so interwoven as to expose the whole allegation to a traverse, and the consequent necessity of proof to the full extent to which it is carried by the pleadings. Mr. Stephens, in treating upon this point, says, that though a less estate than a seizin in fee would have been sufficient to sustain the plaintiff's case, yet, as the plaintiff, who should best know what estate he had, had pleaded a seisin in fee, his adversary was entitled to traverse the title so laid. Steph. Pl. 248. See 1 Chit. Pl. 508 to 510, where it is said the general issue is equivalent to a traverse of every traversable fact.

In the case of Savage *v.* Smith, 2 H. Black. 1101, 1104, which was an action of debt against a bailiff for extorting illegal fees upon a writ of fieri facias, the declaration stated a judgment and a fieri facias upon the judgment. The fi. fa. was given in evidence, but not the judgment. The court held, that though it might be unnecessary to aver the judgment (5 T. R. 498), yet having been averred, it ought to be proved. Ld. Ch. J. De Grey expressly went on the distinction between immaterial and impertinent averments, and said the former must be proved because relative to the point in question. Gould's Pl. 162. These terms immaterial or impertinent, though formerly applied to two classes of averments, are now treated as synonymous, per Best, J. 3 D. & R. 209. Immaterial or impertinent averments are those which need neither be alleged, nor proved if alleged: unnecessary averments consist of matters which need not be alleged, but being alleged must be proved. 1 Greenl. Ev. 73, n. Further illustrations of the same rule may be found in 7 John. R. 321; 3 Day 283; 2 Saund. Pl. and Ev. 686.

The rule stated by Mr. Gould, in his work on Pleading, 162, would appear to confine the question to a matter of variance which can only occur in a matter of record, a written instrument or express contract. If the rule, as stated by Judge Gould, is to be understood as excluding an unnecessary connected allegation in the statement of title or the foundation of the cause of action, then he would disregard the case of Savage *v.* Smith, which he cites and approves. But as the statement in the pleading in this case is in a point confessedly material, his rule can hardly be said to exclude this case; for in the same sense in which it was necessary to prove the averment of the judgment in Savage *v.* Smith, it is necessary to prove the averment of seizin in fee in this case. In the case of Gwinnet *v.* Philips, 3 T. R. 645, Lord Kenyon says, There is no doubt, if a plaintiff undertakes to set out his title, he must set it out correctly; and in the case of Williamson *v.* Allison, 2 East. 452, Lord Ellenborough says, with respect to what averments are necessary to be proved, I take the rule to be, that if the whole of the averment may be stricken out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be stricken out without getting rid of a part essential to the cause of action, for then, though the averment may be more particular than it need have been, the whole must be proved or the plaintiff cannot recover. This is an expression of the same doctrine that was laid down by Lord Mansfield in the case of Bristow *v.* Wright, Dougl. 665. This same doctrine is maintained and illustrated in 1 Greenl. Ev. secs. 51, 56, 57, 60 and 62; Phil. Ev. 206, 207, and the notes thereto, in Cowen and Hill. Many cases are referred to, and some that would seem to vary the rule, but it is manifest the judges do not intend to lay down a new rule. That there should be some diversity of opinion, arising mainly from the different views which courts may have taken of its application, is perhaps not singular; but, amongst all the cases, I do not find one in which it is stated that an averment descriptive of and limiting the title set up by the plaintiff in his declaration, as the foundation of his right of recovery, need not be proved as made, or that any part of it may be stricken out. It will be found, by a reference to the sections cited from Greenleaf's Evidence, that after analyzing the principles of pleading and evidence, and the decided cases upon the doctrine of impertinent and unnecessary averments, he fully and repeatedly affirms the position, that an averment, such as the one in question, cannot be divided, but must be proved as made.

But it is said, proof of possession is evidence of seizin in fee, and supports the averment in the declaration. If so, the rule which we have stated has no force. Seizin in fee may include possession. It is of two kinds, seizin in deed, or, as Lord Coke terms it, a natural seizin, and seizin in law, or a civil seizin. The former is actual possession of a freehold, the latter a legal right to such possession. Does the proof of possession, under a claim of title founded upon a deed which does not emanate from the source of title in this country, or is not traced down to a person so claiming title, raise a legal presumption of a seizin in fee in the person so in possession? Unless this presumption arises from proof of possession, it is not perceived how the fact of defendant's having a deed from some one who is not shown to have had any title, can add any force to the proof of mere possession. The case of Smith v. Lorillord, 10 John. R. 339, is cited in support of this position taken by defendant. That was an action of ejectment. The plaintiff showed that he and his ancestors occupied the premises in question previous to 1768 and down to 1775, and until driven out by the public enemy. Defendant proved his entry into the premises in 1795, some time after the public enemy had left, and his continued possession for fourteen years, and until action brought. Both parties failed in making out a paper title. Kent, J., held that the facts shown by plaintiff were prima facie evidence of right, and it was not necessary that a plaintiff in ejectment should in every case show a possession of twenty years, or a paper title, and that a possession for a less number of years would form a presumption of title sufficient to put the tenant on his defence. He further adds: This presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a title which cannot be overreached, or puts an end to the doctrine of presumption founded on mere possession, by showing a regular legal title or right of possession. It is said the action of ejectment is in truth an action of trespass. You may try the title, or not, but if a party does not think proper to show a title, he may try nothing but the right of possession.

In the cases in 7 Wheaton 59, and 1 Cowen 613, the presumption of seizin in fee was not raised in support of averments in the declaration, but for the purpose of rebutting presumptions arising from the case, made by defendant, who had attempted to shift the presumptions of law from the plaintiff's case to his own. The case in Cowen was ejectment, and in many of its features it was similar to that in 10 Johnson. The case cited from 7 Wheaton was a case from Connecticut, and was an action of disseizin, but as far as can be gathered from the case, it would appear that the averments in the declaration were the same as those in ejectment, and the case shows that the parties relied upon possession, and various presumptions of law arising from the case made. Neither of these cases presents a discrepancy between the averment and proof.

Another class of cases is cited, which arose under a statute in New York, in relation to forcible entries and detainers. In the case in 11 John. R. 504, 510, the indictment averred a seizin in fee in the relator from March 19, 1808, until 1811. The counsel for the people, in opening his case, proposed to show possession only, in relator. The judge held that the title was in question, and the people must give the same proof as in ejectment. Defendant entered under a sale on an execution against the relator. It was objected the people had not proved seizin in fee in relator. The court held, relator's proof of possession was sufficient if he showed he was forcibly dispossessed, and that defendant could not set up title to defeat it, but must restore the possession wrongfully taken. The judge who finally gave the decision, says it was a mistake in saying the title was in question, and after citing 2 John. R. 98, adds, "the statute was made to prevent persons from doing themselves right by force." In the case in 9 Wendell 50, the court refer to the statute of the state in which it is expressly provided that, "in addition to the forcible entry and detainer complained of, the complainant should only be required to show that he was peaceably in the actual possession of the premises at the time of the forcible entry and detainer, or was in the constructive possession of the premises at the time of the forcible holding out." This statute renders proof of seizin unnecessary, though it was required to be alleged. Nelson, J., says, without the statute it would only have been necessary to show possession; and he cites the case in 11 Johnson. In a similar case, in 9 Wendell, 223, it was objected that seizin in fee was not proved as alleged; but the court say, proof of possession is prima facie evidence of a fee. Whether this remark is based upon the case in 11 Johnson or the statute does not appear.

Under the peculiar phraseology of the New York statute, the court appear to regard the required averment of a seizin in fee as merely formal, and not the gist or point of the action. The effort of the court in these cases appears to have been, to limit an indictment to a question of disturbance of possession. No authorities are cited except cases of ejectment. These cases appear to be law in New York, in cases arising under the statute cited, though I do not find them referred to in any book or case in connection with the subject of surplusage, or immaterial averments. It is conceded that there is less strictness of proof required in actions of tort than in actions on contract. On contract the plaintiff must prove his case as laid, whereas in tort he need only prove so much as gives him a good cause of action; and under their statutes the courts of New York have permitted amendments when requested so to do, by striking out that which would not occasion surprise to defendant. 19 Wendell 541, 543. But were it competent to disregard that which might have been amended, the plaintiff's case would not be helped by such amendments.

The tract of land claimed by plaintiff formerly composed a part of a larger tract owned by Solomon Sibley in 1822, at which time the dam was built, which occasioned the flowing of which plaintiff complains. It was not divided from the mill tract until after 1831, at which period the whole tract, including mills, dam and mill pond, was vested in Munson. Plaintiff got a part of his title in 1834, and the rest in 1839. In the mean time, and from 1822, the water had flowed the same as at the trial. Defendants showed themselves to be in possession of the mill at the time the suit was commenced. By this proof defendants undertook to make out a prescription, by showing adverse possession upwards of twenty years, continued from Sibley down to them. To rebut this proof, the plaintiff shows title from the U. States down to Munson, in 1831, and then rests. He shows no title down to himself, but shows a deed from two persons not claiming through Munson. The land so purchased by plaintiff would appear to have been overflowed when he bought it, for the mill dam and pond were kept up, down to the commencement of the action, by defendants and others. If so, could the plaintiff, by barely taking and keeping possession of the part not flowed, acquire a right to sue for disturbance to that of which defendants were in the occupation, and of which plaintiff could have no actual possession? And would not the presumption of seizin in fee be as strongly raised in behalf of defendants as plaintiff? It therefore became necessary for plaintiff to show title, seizin in fee, which would draw to it the possession, to overcome the defendant's case. Then what would plaintiff gain by disregarding or striking out his averment of seizin in fee, since it was necessary for him to prove title—seizin in fee, to entitle him to recover. This he failed to do.

But upon the supposition that proof of possession was evidence of a seizin in fee, it could be but a bare presumption, liable to be overcome by proof, as occurred in this case. First, the defendants showed adverse and continued possession of the premises from a period beyond the time when plaintiff took possession; and secondly, plaintiff himself introduced proof which showed that the fee of the land still rested in Munson, not defeated by plaintiff's possession for a period which would bar Munson's claim. It is true plaintiff introduced this proof to rebut defendants' proof of prescription; but for whatever purpose introduced, we have it, and we cannot restrict its operation to that object, but it becomes a part of the proof in the case, which plaintiff cannot deny; and it appears to me, that in the face of his own showing of such outstanding fee simple estate in a third person, no presumption could arise of a seizin in fee from the possession of plaintiff, under deeds from persons having no title, even if defendants had shown no occupation or possession.

Judgment reversed.

FARMERS' AND MECHANICS' BANK ET AL. v. KIMMEL.

Usury, under R. S. 1838, is a personal defence, to be interposed by a party to the contract, of which a subsequent purchaser cannot avail himself.

APPEAL from the Court of Chancery. In June, 1843, Kimmel filed a bill in the court of chancery to foreclose a mortgage executed to him by one Ward, on the 11th February, 1841. The bank held a subsequent mortgage given by Ward, and in its answer set up usury in the mortgage to Kimmel. The usury consisted in the conveyance by Ward to Kimmel, of a village lot, not covered by the mortgage, as a bonus or consideration for the loan, beyond the legal interest. Ward made no defence, and the chancellor having made a decree in favor of Kimmel, for the amount of the mortgage and interest, the bank appealed. The court, in deciding the case, say, per MILES, J., who delievred the opinion, "We will not stop to inquire whether this amount would be reduced by the value of the village lot, in case the mortgagor had set up the usury as a defence to the foreclosure, because we think that at least under the statute (R. S. 1838), the defence is personal, and however the appellants may be affected incidentally by the contract, they cannot take advantage of the usury. A contrary rule would hold out no relief to the borrower. It would only be transferring his money from the pocket of the lender to the pocket of the holder of the equity of redemption. De Wolf *v.* Johnson, 6 Peters' Cond. R. 152."

Decree affirmed.

Dana & Mather, for appellants.

Bacon, for appellee.

SHADBOLT *v.* BRONSON.

A judgment against C, in a justice's court, for $24..22 damages and $1..92 costs, was stayed by S for six months, instead of three months as the statute required. After the expiration of the six months, the justice issued execution on the judgment against both C and S, on which a mare belonging to S was taken and sold. In an action of trespass for taking and selling the mare, by S against the justice, *Held*, the justice had no right to issue the execution against S, *for want of jurisdiction*, and that, in doing so, he was a trespasser.

CASE reserved from Oakland Circuit Court. Shadbolt sued Bronson, before a justice, in an action of trespass, for taking and carrying away a mare, the property of Shadbolt, and recovered judgment for the value of the mare. Bronson appealed to the circuit court, and on the trial of the cause in that court, it appeared that on the 19th July, 1844, one Gibbs recovered judgment against one Carpenter, before Bronson, who was a justice of the peace, for $24..22 damages and $1..92 costs; that on the same day Shadbolt executed an instrument in writing, by which he agreed to become security for the payment of the amount of the judgment in *six* months; and that, after the expiration of the six months, the judgment not having been paid, Bronson issued execution on the judgment against both Carpenter and Shadbolt, on which the mare was taken and sold. The question whether Shadbolt could recover, on these facts, was reserved by the circuit judge for the opinion of this court.

M. L. Drake, for plaintiff.

Stevens, for defendant.

By the court, MILES, J. The statute of 1841, regulating proceedings in justice's courts, page 102, sec. 77, provides that "no execution shall issue on any judgment rendered by a justice of the peace, if the judgment debtor shall, within five days after the rendition of the judgment, give security in writing, with one or more sufficient sureties, satisfactory to the judgment creditor or the justice, for the staying of the execution and for the payment of the debt or damages, with the interest thereon and costs, in three months, if the debt or damages shall not exceed twenty-five dollars," &c.

The 73d section provides, that "In all cases where security is given for stay of execution," (as thereinafter provided) "if the debt or damages and interest thereon, together with the costs, shall not be paid within the time limited by law for such stay, execution shall be issued by the justice, on application of the judgment creditor or his agent or attorney, against both principal and surety, in the same manner as if judgment had been entered against both principal and surety, on return of process personally served."

The defendant in the judgment did not furnish such security as the statute requires. The only condition upon which the execution could be stayed, was upon giving security for the payment of the damages, interest and cost within *three* months, and if the requisition of the statute was not complied with, the plaintiff in the judgment was entitled to have execution issued at the expiration of the five days.

The agreement of the plaintiff in this case, then, not being such as is contemplated by the statute, could not operate as a stay of the execution, and being insufficient for that purpose, it seems to this court it must be held to be entirely inoperative and void. It cannot be said to be good for the purpose of rendering the person who executed it liable to an execution if the judgment was not paid, and yet ineffectual to stay the issuing of such execution.

The 73d section furnishes all the authority which the defendant can claim for issuing the execution against the plaintiff in this suit; and he never having become such surety or stay as required by the statute, the justice acquired no jurisdiction as to him; and although he had, as he now contends, jurisdiction of the question of issuing an execution, yet it was only as to the defendant in the judgment.

If this position be correct, then the only remaining inquiry is as to the liability of the defendant in this action. The rule on this subject is well stated in Adkins *v.* Brewer, 3 Cowen's R. 206. In that case the justice had issued an attachment without the requisite proof being first in form presented to him, that the defendant was concealed or had departed; and he was held liable, as the statute not only pointed out what circumstances should justify such a proceeding, but directed the manner in which those circumstances should be made to appear to the court. Ch. Jus. Savage, in delivering the opinion, says, "the rule as to the justice's liability is, that when he has no jurisdiction whatever and undertakes to act, his acts are *coram non judice*, and void. If he has jurisdiction, and errs in exercising it, then his acts are not void, but voidable only. In the former case he is personally liable, in the latter not." See also Calvin *v.* Luther, 9 Cowen 61; Bigelow *v.* Stearns, 19 John. R. 39. In Lewis *v.* Palmer *et al.*, 6 Wendell 367, it was held that a justice of the peace who issued a second execution, after the first had been satisfied, though he did so upon the fraudulent representation of the plaintiff therein, that the first had been lost, was a trespasser. This decision was placed upon the ground of a want of jurisdiction. The first execution should have been returned unsatisfied, in whole or in part, or proof of its loss have been submitted, to authorize the issuing of another.

Rogers *v.* Mulliner, 6 Wendell 597, and Hoose *v.* Sherrill, 16 Wendell 33, have been referred to by defendant's counsel to sustain the doctrine that, "in issuing process at the request of a party, a justice acts ministerially, and is justified in issuing any process within his jurisdiction which is demanded by a party, provided the justice acts in good faith." In Rogers *v.* Mulliner, suit was brought against both justice and plaintiff, for issuing a warrant without oath against a party who was a freeholder. The court admit the liability of the plaintiff in the warrant, and as we suppose upon the ground of the want of jurisdiction in the justice; the statute requiring an oath, and the same court having previously declared, in Bissell *v.* Gould, 1 Wendell 210, in a precisely similar case, that "without oath the justice has no jurisdiction over the person of the defendant, and all parties concerned in such arrest are trespassers." Ch. Jus. Savage, who delivered the opinion in both cases, says in the last case that this rule, as respects ministerial officers, must be subject to qualification; and refers to the rule in Percival *v.* Jones, 2 John. Cas. 49, that ministerial officers are not responsible for executing any process, regular on its face, so long as the court from which it issues has general jurisdiction to award such process.

This rule applies well to ministerial officers in the service and execution of process. The Ch. Jus. says, "Under our statute the justice has jurisdiction of the process of warrant without oath, as well as summons. In certain cases an oath must be made before a warrant can legally issue: a constable is not to inquire, when he receives a warrant, whether a defendant is a freeholder, and if so whether an oath has been made."

Admitting this, how can we apply it to the justice who issues the warrant without oath, and of consequence proceeds without jurisdiction? This is attempted to be answered by the assertion that the justice is not bound to know officially the property or circumstances of every person in the community. We think this is a mistake. Sec. 19 Rev. Stat. N. Y., vol. 1, p. 161, provides that "in all cases, on application for a warrant, *except where the suit shall have been commenced by summons*, the person applying shall by affidavit state the facts and circumstances within his knowledge, showing the grounds of his application."

This section is a re-enactment of the 18th sec. of the act of 1824, under which this case of Rogers *v.* Mulliner was decided, with the addition of the words in italics. The act of 1824 provided, however, for issuing a warrant in a case where a summons had been served by copy. See revisor's notes, 3d vol. 2d ed. Rev. Laws N. Y. p. 681.

If we admit the truth of the proposition, and it is now too well established to be for a moment questioned, that the justice only acquires jurisdiction over the person by a strict compliance with the requirements of the statute, and if "without oath the justice has no jurisdiction over the person of the defendant," how can we come to the conclusion that the justice is not responsible, even when acting under the direction of the party?

That was not a case of a ministerial officer bound to execute process fair upon its face, and therefore protected, but a case where the justice had means of knowing whether or not he was acting correctly. He certainly knew that no summons had been returned served by copy, and could ascertain by the oath of the party whether he was otherwise entitled to the process. In Savacool v. Boughton, 5 Wendell 170, where this whole subject was fully considered, the court distinguish between an officer thus acting and the *court*, which is held responsible for the illegal command which he may give to one bound to execute his will.

But if we give these cases their full weight as authority, can we say in this case that the defendant had no means of knowing that he was acting incorrectly? The act substitutes the voluntary agreement of the party to pay the judgment within a specified period, in the place of the personal service of process. He is considered as appearing and acknowledging himself to be indebted to the plaintiff in a sum certain to be paid on a day certain. When that period expires, if the money is not paid, execution issues as upon any other judgment.

By the decisions in this court, we have determined that all the forms required by the statute, upon confession of judgment before a justice of the peace, should be complied with, or the justice acquires no jurisdiction. Beach v. Botsford, 1 Doug. Mich. Rep. 199. The principle upon which these and all other cases upon this subject are decided, that of requiring "courts and officers of special and limited jurisdiction to observe at their peril the boundaries of power," has ever been held wise and salutary. See Wight v. Warner, 1 Doug. Mich. Rep. 384, where the principle of Adkins v. Brewer is recognized and adopted. Platt, J., in Suydam v. Keys, 13 John. R. 444, says experience has shown that the safety of private rights will not admit of the relaxation of this rule.

We see no reason why it should be relaxed in this case. The justice had the statute before him. If the agreement was not a compliance with it, he was not bound to receive it; or, having received it, he was obligated to inquire, before he issued execution, whether he had acquired the right so to do. A reference to the provisions of the law, which are very plain, would have at once answered the inquiry. He chose to act without any authority, and must be held responsible therefor. We think the plaintiff is entitled to judgment, and direct that it be certified accordingly.

Certified accordingly.

The Peolpe *v.* Girardin et al.

In an indictment for publishing a bawdy and obscene paper, it is not necessary to set forth the obscene matter on which the people rely for a conviction.

The defendants were indicted in the District Court of the county of Wayne, for publishing an obscene paper. The indictment set forth, among other things, that the defendants "unlawfully, wickedly and impiously did print and publish, and cause and procure to be printed and published, a certain wicked, nasty, filthy, bawdy and obscene paper and libel, entitled City Argus; in which said paper and libel are contained, among other things, divers wicked, false, feigned, impious, impure, bawdy and obscene matters, language and descriptions, wherein and whereby are represented the most gross scenes of lewdness and obscenity," &c. On the trial Girardin was convicted, and thereupon his counsel moved in arrest of judgment for the reason that the obscene matter, for publishing which he had been found guilty by the jury, was not set forth in the indictment, and the district court reserved the question for the opinion of this court.

Taylor, for defendant.

Buel, district attorney, for the people.

By the court, WHIPPLE, J. It is a general rule, founded in justice and good sense, that every indictment should contain a certain description of the offence, of which the defendant is accused. It is also said that the indictment should contain a statement of the facts by which it is constituted, so as to identify the accusation. 1 Chit. Cr. L. 169. This is generally deemed proper for various reasons, the principal one of which is, that the defendant may be protected from being questioned a second time on the same ground. But the principal facts and circumstances which constitute an offence, need not in all cases be set out in the indictment. Exceptions to the general rule may be instanced in cases of indictments for being a common scold, or barretor; for keeping a disorderly or a common gambling house. So an indictment against a person for endeavoring to incite a soldier to acts of mutiny (1 Bos. and Pul. 179), or a servant to rob his master, has been held good, without stating the particular means adopted. An exception to the rule is also found in indictments for aiding prisoners to escape: it is sufficient to say "aiding and assisting." And in charging an accessory before the fact, the words "that he did incite, move, procure, aid and abet," have been held sufficiently descriptive of the offence, without stating in what manner and by what means the person charged did incite, &c.

But there is another rule as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow its records to be polluted by bawdy and obscene matters. To do this, would be to require a court of justice to perpetuate and give notoriety to an indecent publication, before its author could be visited for the great wrong he may have done to the public or to individuals.

And there is no hardship in this rule. To convict the defendant, he must have been shown to have published the libel: if he is the publisher, he must be presumed to have been advised of the contents of the libel, and fully prepared to justify it.

The indictment in this cause corresponds with the precedents to be found in books of the highest merit. If authority was necessary, the case of the Commonwealth *v.* Holmes, 17 Mass. 336, fully sustains the views we have expressed.

Certified accordingly.

STEVENS v. OSMAN.

"A quantity of corn consisting of about 200 bushels, and a quantity of rye consisting of about 100 bushels," is not a sufficient description of the property to maintain replevin.

In replevin a defective description of the property must be taken advantage of by special demurrer, as it would be held sufficient after verdict, avowry, or plea of property in defendant.

CASE reserved from Oakland Circuit Court.

M. L. Drake, for plaintiff.

Wisner & Hosmer, for defendant.

By the court, WHIPPLE, J. The only question presented in the case is whether the declaration contains a sufficient description of the property replevied. The action, it is to be observed, is for the *wrongful detention* of "a quantity of corn (consisting of about 200 bushels), and a quantity of rye (consisting of about 100 bushels).

It is well settled that in actions for a tort, it is not, in general, sufficient to alledge that the defendant injured or took divers goods and chattels of the plaintiff without giving a description of them; and that more particularly is necessary in *replevin* and *detinue*, for the reason it is only in these forms of action that the goods themselves can be recovered. 1 Chit. Pl. 377, edi. of 1844. Blackstone says, that in *detinue*, it is necessary to ascertain the thing detained in such a manner as that it may be specifically known and recovered: therefore, it could not be brought for money or corn unless it be in a sack or bag, for then it may be distinguishably marked. 3 Black. Com. 152. The same reasoning applies with equal force to the present action. The writ should, on its face, contain such a description of the goods, as would enable the sheriff, with reasonable certainty, to distinguish them from other property of a like nature. The corn and rye is alleged to have been wrongfully detained in the township of Waterford in the county of Oakland. With such a description, the sheriff would have had some difficulty in executing his writ. It was the duty of the plaintiff, not only to state the township in which the property was alleged to have been detained, but the *particular* place in the township; with such further description as would have enabled the sheriff to distinguish the corn and rye for which the action was brought, from other grain of a like kind: as, for instance, by stating that it was in a particular barn, or mill, or granary, or that it was in sacks, or bags, or barrels, situated in a particular place. With such a description, the thing detained is specifically known, and the officer guided in the discharge of his duty. Certainty of description is also necessary to enable the court, if necessary, to award a return of the property, which could not be done, if perchance, the sheriff should have taken grain not the subject of controversey between the parties, in consequence of the insufficiency of the description. It is not intended to be understood that the particular place in a township in which property is alleged to be unlawfully detained, should in all cases be stated; but only when the description of the place is necessary to identify and describe the property to be replevied. In the case of DeWitt *v.* Morris & Platt, 13 Wendell 496, the property was described as follows: "Goods and chattels, to wit: about 400 tons of iron ore, commonly called bog ore." In that case the court held the writ defective, in not being more specific in the description of the chattels to be taken, and that the sheriff should have refused to execute it. It is admitted that the defect must be taken advantage of by special demurrer, as the description would be held sufficient after verdict. It would also be deemed sufficient if the defendant had avowed or pleaded property in himself, as there would then be no controversey between the parties as to what the goods were. The sheriff in this case should have refused to execute the writ; having executed it, however, constitutes no reason for the very general description of the property contained in the declaration.

The demurrer in this case is well taken, and it must be so certified.

Certified accordingly.

ROMEYN ET AL. *v.* HALE ET AL.

An order made by the chancellor denying a motion to stay a sale under a decree of foreclosure, and vacating a temporary order granted staying the sale until such motion could be heard and disposed of, cannot be appealed from.

MOTION to dismiss an appeal from the court of chancery. Romeyn obtained a decree of foreclosure against Hale, in the court of chancery, and the mortgaged premises were about to be sold under the decree, by a master, when Hale applied to the chancellor on certain affidavits and exhibits, for an order staying the sale. An exparte order was granted, requiring Romeyn to show cause, at a certain time, why the sale should not be stayed, and, in the mean time and until further order, staying a sale by the master. On cause being shown, an order was made denying the motion for a permanent stay of sale, and vacating the previous order. From this last order Hale appealed.

Stewart & Goodwin, for the motion.

Joy & Davidson, contra.

By the court, WHIPPLE, C. J. The only question presented for our consideration is, whether this last order is, within the true intent and meaning of the statute, such a "decree or final order," as is the subject of an appeal.

The order made by the chancellor, was for a temporary stay of proceedings under the final decree made in the cause. The order appealed from, vacated the order directing a temporary stay of proceedings, by the chancellor. It would certainly be extending the right of appeal to a degree unauthorized by the statute, and the decisions of this court, to consider an order vacating another order directing a temporary stay of proceedings under the decree, as a final order disposing of the merits of the case, within the meaning of the statute. To permit an appeal in such a case, would be extending the provisions of our statute to almost every order made by the chancellor, denying or granting a motion, subsequent to the final decree in a cause. If the complainants proceed to a sale of the mortgaged premises, and it appear by the record that such sale was unauthorized, or that the master did not execute the decree according to its terms, objection may be made upon motion to confirm the master's report, and a party aggrieved by the order of the chancellor upon such motion can appeal. If, however, the complainants take the initiatory steps for a sale under the decree, when the decree has been satisfied, or when in consequence of matters arising since the decree, he has no right to sell, the court would grant relief, either upon facts to be presented upon a motion to confirm the sale, or upon a direct proceeding instituted by the defendant to inhibit the sale. In the case before us, the order was founded upon a motion made by Hale to stay proceedings. The reasons urged in support of the motion, were founded partly upon what appears in the record, and partly upon matters set up in affidavits. Now it is clear that the rights of neither party were concluded until the action of the court upon the report of the master; if the proceedings of the master were not warranted by the decree, the result would be that those proceedings would be set aside, and the court would be authorized to inspect all orders and decrees made in the cause and connected with the question as to whether the order to confirm should be granted or denied, to ascertain whether its mandate had been carried into execution. If, however, the objections to the confirmation do not appear on the record, the aggrieved party in a proper case has an appropriate remedy by which his rights can be protected.

It is said that a order granting a stay of proceedings, would have authorized the complainants to appeal to this court; and that if the complainants had the right of appeal, supposing the motion to have been granted, it would follow that the defendants' right of appeal cannot be questioned, as the motion was decided against him. It may be that, if the court below had granted a *perpetual* stay of proceedings, an appeal might have been taken to this court. The order as to the complainants might have concluded them as to the merits of the question presented by the motion; the same, however, cannot be said of the defendant. If he has rights, they may be asserted when presented in a proper way, and at a proper time.

Appeal dismissed.

PARKS *v.* BARKHAM.

Where there has been misnomer of the defendant, in replevin, under R. S. 1838, the circuit court may, after service of the writ, but before the execution of the replevin bond, permit the plaintiff to file a new affidavit, and thereupon to amend the writ by inserting the true name of the defendant.

CASE reserved from Oakland circuit court. Replevin. The proceedings were instituted against the defendant by the christian name of *James*. After the affidavit had been filed and the writ issued and served, but before the execution of the replevin bond, it was discovered that the defendant's name was *Joseph*; and the plaintiff thereupon moved the circuit court for leave to amend the affidavit and writ by inserting the latter name.

Parks, in person, in support of the motion.

Stevens, contra.

By the court, WHIPPLE, C. J. My impression at the circuit was that the motion should be denied, for the reason that the affidavit, which was the foundation of the proceedings, could not be amended. My attention, however, was not drawn to the proviso contained in the 2nd sec. of chap. 5, title 4, part 3 of the Revised Statutes of 1838. By the terms of that proviso, a motion to quash a writ of replevin, in case the same issued before the filing of the proper affidavit, is to be denied, provided the plaintiff should, within such time and upon such terms as the court might direct, file with the clerk the affidavit required by law. A liberal interpretation of the statute will authorize the court, not to direct the affidavit already filed to be amended, but to authorize the filing with the clerk of a new affidavit.

In the case before us, the service of the writ was on *Joseph* Barkham, to whom the bond in replevin was executed, and we see no reason why the plaintiff may not, under the broad provisions of the proviso above cited, file another affidavit, alleging the property to have been wrongfully detained by *Joseph* instead of *James* Barkham, previous to the issuing of the writ.

The process, being served on the proper person, though by a wrong name, may be amended; this our statute of amendments allows.

We are of opinion that the motion to amend the writ be allowed, upon the filing by the plaintiff of a new affidavit, under such terms as the circuit court may prescribe.

Certified accordingly.

DELEVAN *v.* BATES.

D. took a mare belonging to B., which he afterwards sold to T., against whom B. brought replevin and recovered the mare. Afterwards B. sued D. in trespass, to recover the damages he had sustained by reason of the detention of the mare from him, and the expense he had been at in regaining possession of her. *Query*, whether an action will lie in such a case. The proper action, if one will lie, is trespass and not case.

In action of tort, every thing that may properly be considered by the jury in mitigation of damages, may be given in evidence under the general issue.

ERROR to Hillsdale Circuit Court. Bates sued Delevan before a justice of the peace, in trespass. The declaration alleged that Delevan, on the 28th February, 1839, with force and arms, certain goods and chattels of the plaintiff, to wit: a sorrel mare of the value of $100, seized, took, led and carried away, and to his own use converted and disposed of, and that he kept and detained the same from the plaintiff for the space of three years, next following; and that by reason thereof the plaintiff had been obliged to pay $100, in order to regain possession of his property; and had also been subjected to great expense and trouble, and had been obliged to pay $100 to procure another team, &c. Delevan plead not guilty, and for a further plea, that he took the mare as deputy sheriff of the county of Hillsdale, by virtue of an execution against one Oliver Bates, &c.; and gave notice that he would give in evidence under the general issue, that Bates had instituted a suit in replevin, in a justice's court, before the commencement of the present suit, for the recovery of the mare against one Town, who purchased her when she was sold by defendant on the execution, and that in that suit judgment was had for the recovery of the mare by Bates. Bates recovered judgment in the justice's court, and Delevan appealed to the circuit court. On the trial in the circuit court it was admitted by the parties that Delevan took the mare, and that Bates had recovered possession of her in the replevin suit, and that in the present suit he did not seek to recover the value of the mare, but the damages only arising from the taking. The counsel for Delevan thereupon moved for a nonsuit, on the ground the action should have been case instead of trespass; and for the reason that the recovery in the replevin suit was a bar to the present action. The motion was denied; and defendant then offered in evidence the docket of the justice in the replevin suit, which was objected to by plaintiff's counsel, and the objection sustained by the court, because the notice accompanying the plea did not state a satisfaction of the judgment. Defendant excepted, and afterwards sued out his writ of error.

Murphy, for plaintiff in error.

Howell, for defendant in error.

By the court, GREEN, J. The property in question having been unlawfully taken by Delevan, and sold to Town, who unjustly detained it from Bates, he was at liberty to prosecute his remedy against either of the wrong-doers, at his election. He elected to prosecute his writ of replevin against Town, and recovered his property, with the costs of suit. In that action, he was also entitled to recover his damages for the detention, (R. S. 1838, p. 525,) and whether he claimed such damages, or had them assessed or not, is entirely immaterial so far as this case is concerned, a waiver of damages being equivalent to a satisfaction.

The first question presented is, whether the action should have been case or trespass? There can be no doubt that if an action can be sustained upon the facts contained in the record, the form of action adopted is the proper one. The wrongful taking complained of, was a direct and immediate injury to the plaintiff, and until the recent statute authorized an action on the case for such an injury, that form of action could not be used in this class of cases.*

But a more formidable question, and one about which we entertain very serious doubts, is, whether Bates, having elected to prosecute his action of replevin against Town, a vendee under Delevan, and having recovered his property in that action, can still maintain this action against Delevan? See Cowen & Hill's notes to Phillip's Evidence, 828, 978, and the cases there cited. This last question, not having been very clearly and distinctly presented by the record, nor fully discussed by the counsel, and the decision of it being of considerable importance as a precedent to govern this court hereafter in like cases, we shall not now undertake to decide; for whether the circuit court was right or not, in refusing to nonsuit the plaintiff, the judgment in this cause must be reversed upon another ground.

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* R. S. 1846, p. 484, § 30.

The only other question necessary to be considered is, whether the circuit court erred in refusing to admit in evidence the docket of the justice before whom the replevin suit was tried? In actions of tort, every thing which may properly be considered by the jury in mitigation of damages, may be given in evidence under the general issue; for such matters cannot be pleaded, and a notice of them would be of no avail.

Assuming, then, that this action may be maintained, the justice's docket, showing the recovery of the property, with the costs of the suit and a waiver or satisfaction of the damages to which the plaintiff therein was entitled, should have been admitted, as evidence in mitigation of the damages; and that evidence having been erroneously rejected, the judgment must be reversed, and a new trial awarded—the costs to abide the event.

Judgment reversed and new trial awarded.

JAMESON ET AL., APPELLANTS FROM DECREE OF PROBATE COURT OF CHIPPEWA COUNTY.

A will after devising the real estate of the testator, contained the following clause, viz: "It is my will that all my furniture and property be in common to my beloved wife, Elizabeth Holiday, and daughter, Jane J. Holiday, so long as they live and keep house together, and that whenever they separate or break up house keeping, that the furniture be divided between them, at their own discretion, and the stock of cattle to be given up to my beloved wife Elizabeth, for her sole use and behoof." *Held*, that a claim which the testator had against the Chippewa Indians, and which was allowed and paid over to the executor under a treaty concluded after the testator's death, between the Indians and the United States, did not pass under it to the widow and daughter.

No rule is better established, than that general words in a will may be restrained in their meaning, or rejected entirely, to carry out the intention of the testator. So general words may be construed by the particular words which follow.

APPEAL from the Probate Court of Chippewa county.

John Holiday, on 29th November, 1841, made his last will and testament as follows: "In the name of God, amen, I, John Holiday, of the

Sault Ste. Marie, Michigan, do make and declare this my last will and testament, in manner and form as follows. First, I resign my soul into the hands of Almighty God, hoping and believing in a remission of my sins by the merits and mediation of Jesus Christ, and my body I commit to the earth, to be buried at the discretion of my executors hereinafter to be named, and my worldly estate I give and devise as follows:

"First, I give and devise and bequeath unto my beloved daughter, Mary Holt, one-third of all my lands, messuages and tenements, situate, lying and being in the state of Illinois, to have and to hold to my said beloved daughter, Mary Holt, her heirs and assigns, forever.

"Also, I give and devise and bequeath unto my beloved daughter, Jane J. Holiday, one-third of said lands, messuages and tenements, situate, lying and being in the state of Illinois, to have and to hold to my said beloved daughter, Jane J. Holiday, her heirs and assigns, forever.

"Also, I give, devise and bequeath to my beloved grand-children, John H. Jameson and Harriet Elizabeth Jameson, the remaining third of said lands, messuages and tenements, situate, lying and being in the state of Illinois, to have and to hold to the said John H. Jameson and Harriet Elizabeth Jameson, their heirs and assigns, forever. It is my wish and intent that each of said thirds or portions be so allotted, as near as practicable, good and bad lands to be in like proportions and quantities.

"Also, I give, devise and bequeath those two lots, messuages, tenements and appurtenances situate, lying and being in the village of Sault Ste. Marie, Michigan: one of which is known as the Billiard Room lot, the other adjoining it on the rear from the water on the hill, for the use and maintainance of my beloved wife, Elizabeth Holiday, during her lifetime, and at her decease to my beloved daughter, Jane J. Holiday, to her heirs and assigns, forever.

"It is my will that all my furniture and property be in common to my beloved wife, Elizabeth Holiday, and daughter, Jane J. Holiday, so long as they live and keep house together, and that whenever they separate or break up house keeping that the furniture be divided between them, at their own discretion, and the stock of cattle to be given up to my beloved wife Elizabeth, for her sole use and behoof. Having, before the making of this my will and testament, given to my beloved daughter, Jane J. Holiday, for her sole use and benefit, a note of hand from L. T. Jameson, for two thousand dollars, payable on demand, and bearing date 15 June, 1841. Said note is endorsed by me and witnessed by J. L. Ord, and I hereby wish it to be hereby so taken and understood.

"As I have given to my son William, from time to time, what I think was sufficient for him, it is my express will and intent that he have nothing whatever.

"It is also my will that what I have herein devised and bequeathed as above to my beloved wife, Elizabeth Holiday, be to her in lieu of dower. And I do hereby appoint my son-in-law, Henry Holt, and my friend, William H. Brockway, as executors of this my last will and testament. In witness, &c."

After his death the will was proved and admitted to probate, and letters testamentory were granted to Brockway, one of the executors, the other declining to act. Holiday in his lifetime had a claim against the Chippewa Indians, and under a treaty made and concluded after his death, at Lapointe of Lake Superior, between Robert Stuart, United States Commissioner, and the Chippewa Indians of the Mississippi and Lake Superior, by their Chief and headmen, on the 4th October, 1842, this claim was allowed to his estate, and paid over to the executor, amounting to $3,157 10. Of this sum, after paying the debts against the estate and charges of administration, $804 68 still remained in the hands of the executor, who petitioned the probate court for an order directing him to whom to pay it. The probate court ordered it to be paid under the will to Elizabeth Holiday and Jane J. Holiday, the widow and daughter of the testator, from which order an appeal was taken to this court by John and Harriet Jameson.

Fraser, for appellants.

Farnsworth and Goodwin, for respondents.

By the court, WHIPPLE, C. J. The only question presented for the decision of the court, relates to the construction of the 5th clause in the will of John Holiday. On the part of the appellants, it is contended that this clause does not cover or make any disposition of the money realized by the executor under the treaty between the United States and the Chippewa tribe of Indians, entered into at Lapointe, in 1842. On the part of the appellees, it is insisted that this clause includes and disposes of the money in question—or, in other words, that under this clause every thing not specifically disposed of by the testator would pass to his wife and daughter Jane.

As a will is the legal declaration of a party's intentions, which he directs to be performed after his death, it follows, that it is the duty of courts, in the construction of wills, to give full and complete effect to the intention of the testator. In accomplishing this object, rules of construction have been adopted, by which courts are guided in cases of doubt in determining the intention of a testator; these rules are founded in good sense and sound reason, and are admirably adapted to the accomplishment of the great object to be attained in the construction of wills. I shall have occasion to apply some of these rules, in the course of this opinion, to the clause in question.

If the testator intended that the claim he had against the Indians should pass, by the fifth clause, to his wife and daughter, he certainly was unfortunate in the selection of words by which such intention is manifested. The word "property," it is admitted, is a word of large signification, and might include every species of property, whether in possession or action. It might, certainly, be so construed as to include the claim referred to, if such construction is justified by a fair interpretation of the clause in question, and especially, if, by such construction, effect is given to the manifest intention of the testator, to be deduced from a survey of the entire instrument. If, after the several devises contained in the will, he had bequeathed *all his property* to his wife and daughter, we should have experienced but little difficulty in arriving at the intention of the testator. Such a bequest, taken in connection with the introductory clause, would have been deemed and held a residuary clause, although not expressed in the words usually employed in framing such a clause. But was the word "*property*" used in its largest sense in the clause in question? It is to be observed that the words of the clause are, "it is my will that all my property and furniture be in common," &c. The word "property" would include the *furniture*, as well as the *cattle* mentioned in another part of the clause; and the introduction of those words cannot be rejected as unnecessary, if it may be fairly inferred that their use was intended to explain what was meant by the general word "property," with which they are connected. No rule is better established than that general words in a will may be restricted in their meaning, or rejected entirely, to carry out the intention of the testator. So general words may be controlled by the particular words which follow. Illustrations of these rules are to be found in reported cases. See 6 Pet. Cond. R. 82, 6, 90; 11 Mass. 528; 10 Paige 187; 2 Atk. 104, 228, 230-1-3-4; 3 Rand. R. 191.

The word "property," then, may be either rejected, or restricted in its meaning, if, by so doing, we do not subvert, but give effect to the intention of the testator. The language of the first part of the clause is as follows: "It is my will that all my property and furniture be in common to my beloved wife, Elizabeth Holiday, and daughter, Jane J. Holiday, so long as they live and keep house together, and when they separate and break up house keeping, then the furniture be divided between them at their discretion; and the stock of cattle delivered up to my beloved wife Elizabeth, to her sole use and behoof." To make this clause sensible, the word "property" should be applied to things capable of being used in common; for it cannot be pretended that it includes real property, that having been disposed of by the previous clauses in the will. To construe the word "property" as including choses in action, would seem a little short of absurdity, as they cannot, from their nature, be used in common. We can readily understand that the wife and unmarried daughter could use in common the furniture, cattle and other personal property of a like nature, but it is difficult to comprehend how a chose in action could be thus used. It would, indeed, have appeared somewhat remarkable, if *money* had been thus disposed of. A person in making a will does not dispose of money by directing it to be used in common among his family, or particular members of that family. If, instead of the claim for over $3,000 against the Indians, he had actually obtained its payment in money, it is apprehended a different mode of disposing of it would have been found in his will. If intended for his wife and daughter, he would either have directed its investment for their benefit, or have given it to them in such proportions as he might deem proper; he certainy would not have given them the *use* of the money, until they separated and ceased to keep house together, and then make no further disposition of it. Admitting, then, that money was included in the word property: all the wife and daughter could claim would be its use until the happening of the event mentioned in the clause. But it seems to me very clear, from a careful examination of the 5th clause, that it includes nothing but the furniture and cattle; or, at most, such other property of a like nature which he may have owned at the time of his death. It was, indeed, said that the words "it is my will that all my property and furniture be in common," imports an absolute disposition of everything included in the word "property." But this construction would overthrow the latter part of the same clause, which gives the furniture to the wife and daughter, and the cattle to the wife to the exclusion of the daughter, when they "separate and break up house keeping." By giving to the words their natural and ordinary meaning, we make the clause consistent and intelligible; by giving it the forced and unnatural construction contended for, we render nugatory a very important part of the 5th clause.

The will before us was evidently drawn by a person not familiar with the legal import of the words he employed; it bears on its face evidence that it was not prepared by a legal mind. This circumstance will explain the peculiar structure of the 5th clause, embodying, as it does, matters having no connection with each other, and throwing them together in a manner so confused as to render it almost unintelligible. The fact that it was prepared by an unskilful hand, furnishes additional evidence of the intention of the testator. If he intended that the claim against the Indians should pass by the will, he would not have used the word "property," as expressive of such intention. The same may be said of the person by whom the will was drawn. The claim itself would have been specifically mentioned, for the reason that an individual unskilled in the use of technical terms would be likely to adopt words with which he is familiar, and by which his intention could not be misunderstood. If, for instance, the testator intended that the chose in action should pass by his will, he would naturally have expressed his wishes in plain and unambiguous terms; he would have characterized it as a claim or demand against the Indians, and not generally, as "property." So of money which he might wish to dispose of—he would call it *money*, and not "*property*."

The argument that the preamble or introductory clause shows that the testator intended to dispose of all of his estate, can have no weight, unless the intention thus declared is expressed with reasonable certainty on the face of the will. The introductory clause can only be referred to in cases of doubtful construction. If, for instance, it appears from the introductory clause that the testator intended to dispose of his whole estate—and the expressions of the residuary clause may, by a reasonable construction, include the whole—they are to be taken in their largest sense, so as to make them harmonize with the introductory part. But in the will before us, there is, in fact, no residuary clause, and the rule above stated has no application.

But it is urged that the concluding part of the 5th clause, and the two subsequent clauses, are conclusive to show that the testator intended to dispose of his entire estate. The testator does not, by the 5th clause, give to his daughter the note against Jameson of $2,000; but to guard against misapprehension, says that he had already given to her the note, and he desired that it might be so understood. Had the note been the subject of a gift by the terms of the will, the fact might have influenced our judgment in giving a different construction to the clause in question. But the most that can be said of the Jameson note is, that it simply furnishes evidence that the testator had made to his daughter a gift of the note, but does not, of itself, confer rights upon her which she did not before possess. It is an assertion by the testator that he desired it to be understood that the note was the property of his daughter. This was undoubtedly done to avoid any controversey that might arise after his death, touching the ownership of the note. This part of the 5th clause may be referred to for the purpose of fortifying the conclusion to which we have come respecting its construction. If the testator was so careful as to refer to a demand against Jameson of $2,000, it is a little remarkable that he should have forgotten to refer specifically to a claim exceeding $3,000, which it is said he had against the Indians. This circumstance, however, may be explained by the fact that claims against the Indians are of so doubtful a character as not to be taken into account by a person in making a final disposition of his estate by will. The testator was fully advised of the manner in which such claims are usually paid. He did not know, and perhaps could not anticipate, that after his death a treaty would be made, by the provisions of which his claim would be allowed. And yet, this was the only mode by which he could reasonably expect to realize anything from it. I have not the slighest idea that this claim entered into his mind when dictating his will; if it had, I am satisfied a specific provision would have been made with respect to its disposition.

It is further urged, that if the decree of the court below is reversed, William Holiday, the son of the testator, would participate in the distribution of the money realized from this Indian claim, and thus defeat the will of the testator. The will recites, that as the testator had given his son what he thought was sufficient, it was his will that "he have nothing whatever." If the language of the 5th clause was of doubtful construction, the argument founded on this clause of the will would have great weight. But if the view I have taken of that clause be right, the construction contended for by the appellees is inadmissible. By it, no disposition whatever is made of the claim against the Indians; all that can be claimed by that clause is, that the use of the property not previously disposed of by the will should be in common by the wife and daughter until the happening of a certain event; after which, the property particularly specified in the clause is finally disposed of; so that, if any other property was intended, no disposition was made of it.

But a survey of the whole will furnishes another argument against sustaining the decree of the court below. Beside the property given to his wife by the 5th clause, an estate for life is also given in "two lots, messuages, tenements and appurtenances, in the village of Sault Ste. Marie." The last clause declares that what he devised and bequeathed to his wife should be in lieu of dower. To his daughter Jane he gave one-third of his real estate in Illinois, besides what she takes under the 5th clause. He also gave to her, after the decease of his wife, the two lots in the village of Sault Ste Marie. To his daughter Mrs. Holt, and/the children of his deceased daughter, who are the appellants in this case, he gave each one-third of his real estate in Illinois. Taking into view the Jameson note of $2,000, it will be perceived that his daughter Jane took a large proportion of the estate. Looking, therefore, to the motives by which the testator was probably influenced in the disposition of his estate, I am unable to see why he should have given to his daughter Jane, besides the real estate and the $2,000 note, so large an interest in the claim against the Indians. That he should have given her more than Mrs. Holt and the children of his deceased daughter, Mrs. Jameson, is not remarkable. As appears by the will, Jane was unmarried; and it was natural enough that such portion of his estate as would be necessary for her support should be given to her. This he has done, and I cannot think that had he supposed the large claim against the Indians would be realized, that he would have excluded his daughter Mrs. Holt and the children of his deceased daughter from a participation of its benefits.

The decree of the judge of probate must be reversed.

MILLERD ET AL. v. REEVES.

Where on error, a motion to set aside the service of a declaration appeared in the transcript of the record, it was held that it could not be noticed as it was not properly before the court.

In an action for flowing land, an unrevoked parol license, given by a third person who had the right to flow, is a good defence.

R. sued M. for flowing a tract of land, alleging seizin and possession in himself. On the trial the only evidence of title given by R. was possession, for about one year, previous to bringing the action. It further appeared in evidence that previous to, and at the time R. took possession, a part of the tract was flowed by M. *Held*, that by reason of M.'s prior possession, by flowing, of that part of the tract covered with water, at the time R. took possession, that R. could not sustain his action without showing title in himself to the land flowed, or that he entered and took possession of the tract by color of a paper title.

ERROR to Washtenaw Circuit Court. An action on the case was brought by Reeves in the circuit court, against the plaintiffs, in error, for flowing, by means of a dam kept up by them, the north-west quarter of section thirty, town one south of range five east, and the east half of the north-east fractional quarter of section twenty-five, in the same town, in the county of Washtenaw, of which lands the declaration alleged that Reeves was lawfully seized and possessed. On the trial various exceptions were taken, which, with the evidence given and that proposed to be given and rejected, bearing upon the questions decided are stated in the opinion of the court. The transcript of the record stated the action was commenced by declaration, and that a copy of it, with notice of the rule to plead, was served on defendants by leaving the same at their usual place of abode; that defendants appeared and put in a plea; and that they afterwards moved to set aside the service of the declaration, and all subsequent proceedings, for irregularity in the service.

Baker, Millerd and Tiffany for plaintiffs, in error.

Hawkins, for defendant in error.

By the court, WING, J. The motion of the plaintiffs in error, to set aside the defendant's declaration, or the service of it, and the several motions subsequently made, though copied into the return, are not brought here by the writ of error, they being mere questions of practice. The fact that they appear in the transcript, does not give this court any power to notice them. We can only notice such matters as are properly brought up to this court by the writ of error.

We must regard the plaintiffs in error as having voluntary appeared to the action, and thereby waived all previous errors.

The proof introduced by the defendant in error, tended to show that he had occupied the premises, a year or more, immediately preceding the trial, and that they were flowed by water set back by the dam of the plaintiffs in error.

From the statement of the testimony in the bill of exceptions, it might be inferred the whole premises described in the declaration were flowed; but this doubtless was not the fact, for the defendant occupied a portion of them.

The defendant commenced his occupation of the land in question in the spring of the year 1843, more than a year before the suit was tried. The proof does not show that defendant entered into possession of the land by color of title, or that he claimed any interest in the freehold. There is no reference in the proof to any deeds under which defendant claimed. He is not shown to have been anything more than a mere occupant. How he acquired possession, or by what authority, is not in proof. Jefferson Brooks, one of defendant's witnesses, testified that the land came into the possession of the defendant in the spring of 1843;

the witness believed defendant bought it of the heirs; he was told so by them; but we are not informed who these heirs are, nor anything about the purchase, nor that defendant ever claimed to have bought the land of heirs, or any other persons. Some of the witnesses speak of the land as defendant's farm; but this must be regarded as descriptive of the land of which they are speaking, rather than as proof of title. It is proved that a number of persons had occupied the land at different periods, before defendant took possession of it.

The plaintiffs read in evidence a deed from Samuel W. Dexter, to Jesse Millard, one of the plaintiffs, and others, in fee simple of certain lands on section 31, embracing a grant of a right to flow Dexter's land by a dam, to be raised two feet high. This deed bears date the 13th January, A. D. 1836. It is evident from this deed that it was the intention of S. W. Dexter to sell a mill site and privilege on section 31. Plaintiffs also read in evidence a warranty deed from defendant to S. W. Dexter, bearing date the 16th of June, A. D. 1840, by which defendant and his wife grant to Dexter, his heirs and assigns, forever, the right to flow the north-west quarter of section 30, (described in the declaration,) by a dam to be erected by Dexter, his heirs or assigns, on section 31. Plaintiffs then offered to prove by S. W. Dexter, who was sworn for them, that previous to the time they erected the dam, Dexter, for a consideration to be paid by them to him, sold the right to flow the land in question by means of a dam; that this sale was by parol, and that, in pursuance of this license, they went on and built the dam, at an expense of $1,000, and flowed the land in question. Plaintiffs also offered to prove by Dexter, that he had given to them a license by parol to flow the land in question, before they built their dam, and that this license was not revoked. This evidence was rejected by the court.

The defendant admitted that the plaintiff, Jesse Millerd, had become the sole owner of the land on section 31 described in the deed from Dexter to him and others, before the dam was erected. I cannot learn from the statements in the bill of exceptions, when the dam was built, nor whether there was any other mill site on section 31, which was then or had been owned by Dexter, or any one else; but I think it may fairly be assumed, from all that is shown, that plaintiffs' mill privilege was the only one on section 31, since Dexter sells, or attempts to sell by parol, the right to flow the lands described in the deed from the defendant to him, which would not have occurred, most probably, if the right could be useful as connected with another privilege on section 31. Dexter had already sold the mill privilege on section 31, and it would appear that this right or easement was obtained by Dexter of defendant for the purpose of perfecting that privilege; for plaintiffs offered to prove that they did not build their mill dam until they had purchased a license from Dexter, co-extensive with his purchase of defendant, as regarded the quantity of land to be flowed. It is not shown that defendant had any title to any of these lands when he conveyed the right to Dexter. Nothing is proved upon this subject. Whatever his interest was, he sold the right to flow, by a warranty deed, and he covenants to warrant and defend the right to Dexter, his heirs and assigns, against all persons claiming under him. If he purchased those lands afterwards again, or if he took possession of them only, he was precluded by his covenant from asserting any right to them inconsistent with their use by Dexter, or his assigns, in the manner designated in his deed. Dexter could use the right thus acquired, or he could assign it to another. It was not a personal privilege granted to him; it was a beneficial right, with an unlimited power of disposal. Plaintiffs purchased it for the purpose for which it was granted to Dexter, and used it accordingly.

It is objected that this right to flow is an incorporeal hereditament, and that it can only be assigned by deed, devise or record. For this reason the circuit judge rejected the evidence offered by plaintiffs. Plaintiffs insist that the parol sale operated as a license—that Dexter could authorize another to do that in furtherance of the plan of building mills on section 31, which he could do himself. Conceding this position, what was the effect of the parol license?

As a general proposition, an easement upon the land of another, cannot be created without deed. Hewlins *v.* Shippman, 5 Barn. & Cress. 221; 11 Serg. & Raw. 207. A temporary right may be granted to divert water or flow land, by a mere verbal license; and it is said that a right so derived, under certain circumstances, will not be revocable at the will of the giver. Angell on Water Courses 61; 14 Serg. & Raw. 267; 4 id. 241; 2 Stark. Ev. 541; 4 Watts' R. 317. And when executed, or when the party has been led to expend money in faith of such license, it is not revocable. 8 East 508; 14 Serg. & Raw. 267; 7 Taunt. 384; 4 Watts' R. 317; 2 Stark. Ev. 541; Law of Easements 25.

In Winter *v.* Brockwell, 8 East 508, Ld. Ellenborough thought it very unreasonable that, after a party had been led to incur expense in consequence of having obtained a license from another, to do an act, and the license had been acted upon, that other should be permitted to recall his license, and treat the first as a trespasser for having done that very act. Angell on Water Courses 65. In the case of Rerick *v.* Kern, 14 Serg. & Raw. 267, the doctrine that a parol license, to use the water of a stream for a saw mill, was good, and obligatory on the person giving the license, if followed by an expenditure of money by the person receiving the license, is fully recognized. 4 Serg. & Raw. 241; 2 Esp. N. P. (Gould's edi.) 268, 636; 17 Serg. & Raw. 383. Such license is good, until countermanded, to excuse a trespass. 4 East 107. Plaintiffs could not be wrong doers until the license was countermanded, in any case. The King *v.* Harndon, 4 Maule & Sel. 562; 8 East 308; 7 Taunt. 384; 4 Watts' R. 317; 4 East 107; 14 Mass. 403; 1 Dev. & Batt. 492. In the case of Clement *v.* Durgin, 5 Greenl. R. 9, plaintiff had agreed to release, or had released by parol, all damages for flowing his lands. The issue tried was whether the respondent had the right to erect the dam and flow the land of complainant, without the payment of damages therefor; the state giving the right to raise the dam and flow lands, subject to payment of damages to the owner of land flowed. It was contended the right claimed by respondent was an interest in lands, and was within the statute of frauds, and could only be proved by writing. The court say, we regard it as rather in the nature of a license to do certain acts upon plaintiff's lands, of which parol proof has always been deemed admissible, as to cut trees, build a bridge, or pass over the land of another, or build a fence. In these, and in many similar cases, proof of a parol license from the owner would be deemed a good defence to an action of tresspass. Such a license is revocable, unless the party receiving it has been led to incur expense; in which case it is not revocable without tendering an indemity. A parol license is a defence to an action of trespass.

The case of Woodbury *v.* Parshley, 7 N. H. Rep. 237, was an action on the case for flowing plaintiff's meadow land, occasioned by a dam built by defendant on his own land. The dam was built by the consent of plaintiff. The question was whether parol evidence was admissible to prove a license to flow plaintiff's land. The court say, this question is now settled on sound and satisfactory principles. It is now held that the statute of frauds does not apply to such a case.

When the court say a grant or license by parol, when the law requires it to be in writing, is void, they mean that it is void to confer the privilege to the extent intended by the parties, but not that it is void to all intents and purposes. Until the license is countermanded, no action can be maintained, and this countermand must be proved on the trial.

In the case of Miller *v.* Auburn Railroad Co. 6 Hill 64, the court appear to think many of the English and American cases cited above, are not law to the extent stated in them. Judge Cowen says, if they are law, you have only to throw the grant into the form of a parol license, and on its being executed, the statute and common law are evaded. He refers to the case of Hewlins *v.* Shippman as overruling many English cases; and to 15 Wendell 380; 3 Kent's Com. 451; 6 Wendell 461, 464, as overruling other cases in New York. But the judge still recognizes the rule for which we contend. He says, suppose the right a defendant claims could not be granted by a parol license executed, still the license may operate according to its own nature; and there is no book which teaches that before a license is revoked or has expired, though it be not executed, a man is liable to pay damages for availing himself of it. It does not follow, by any means, that because a license is void for the purpose of conveying an interest irrevocable, it may not enure as a personal authority, and, until revoked, protect a defendant against an action for a wrong. It would be most strange if, because it could not operate as something more than what it professed, it should therefore be held void for its avowed object, and that, too, a perfectly legal one.

This review of the cases on this subject, shows that a parol license is sufficient to defeat an action of trespass, or trespass on the case. If, therefore, the defendant had parted with the right (exercised by the plaintiffs) to Dexter, and Dexter gave plaintiffs a license which protects them, as we think it does, the court erred in rejecting the evidence offered by plaintiffs on this point. We do not understand the evidence was rejected because Dexter had no power to grant such a license, but because it was inoperative, not being in writing, and, therefore, as against defendant, no protection, since his right to occupy the land could not be contested by a stranger, supposing defendant to have the fee in the land.

Dexter never revoked his license, but appears to have acquiesced in the validity of the sale to plaintiffs—at all events, he permitted plaintiffs to flow the land. Defendant in his declaration, alleges his seizin in fee and possession. This is an assertion that the fee was in him. 5 Cruise's Dig. 58, 239. That the title of plaintiff must be proved as laid, see Saund. Pl. and Ev. 687; 2 Saund. R. 113 a, n. 1, 206 a, n. 22, and 207 a, n. 24. This, as a general proposition, is true. There are some cases in which a seizin in plaintiff will be presumed, as when he claims title against a trespasser on lands in possession of plaintiff. But in this case there is no proof that defendant claimed title of any kind. He did not enter, or hold by color of title, and he seeks damages against persons in possession of that portion of the lands in question, by flowing them, and who had so possessed them by flowing them for years before the defendant took possession. The seizin of defendant[*] could not be presumed to a greater extent than his actual possession. If not, there is no injury done to defendant. The action is for damages to that of which the defendant has not, by his own showing, any actual possession, for it is flowed by plaintiffs. Had the defendant a paper title, whether good or bad, if he entered by color of it, plaintiffs might be called upon to show their right beyond a mere possession; but such is not the case here. It is manifest a mere intruder, or occupier cannot claim, as in this case, for an injury to the inheritance, without showing he had an interest in it to be affected by the plaintiffs' acts. A tenant in possession and the reversioner or remainderman may each have his action for the same nuisance at the same time; and, therefore it is, that the particular interest stated, in respect to which the suit is brought, becomes material.

Color of title, under a deed and occupancy of a part, will be sufficient proof to constitute an adverse possession to a single lot. 1 Cowen 286. This principle applies only to cases where there is no actual occupancy under a different claim.

In Jackson *v.* Vermylia, 6 Cowen 681, the court say, "if A. takes a conveyance or lease of a whole lot, say 63 acres, and improves part, his possession is valid for the whole lot—not on the ground of having title which draws the possession after it until an actual adverse possession commences; but on the ground of a claim of title to the whole, and a possession of a part, which constitutes a good adverse possession.

When a valid possession is acquired in the latter mode, it cannot be defeated by a subsequent entry on the same lot, making an improvement of a part and obtaining a title to the whole. The effect of such subsequent entry would be, to give the person so entering possession of the part actually occupied and improved, but no further." Apply these principles to the present case, and without regard to the license from Dexter, and the fact that the defendant had parted with all his right, whatever it was, to prevent or interfere with the flowing of the land in question: plaintiffs enter and occupy the land by flowing it; defendant enters upon another part of the land without color of title—both being equal in the character and extent of their title—he must be confined to that part actually occupied by him. 10 Wendell 639.

Upon an examintion of the charge of the judge, and applying to it the principles of law which we have gathered or deduced from the cases I have cited, I am of the opinion that the court erred in rejecting the offered evidence of Mr. Dexter. That the court erred in its instructions to the jury that "proof of occupancy and possession of the premises by defendant during the time in question, would be sufficient to sustain the allegation of seizin." The court erred in refusing to instruct the jury that there was no legal evidence before them that the plaintiff was the owner of the premises mentioned in the pleadings, at the least the part flowed by plaintiffs, as the defendant did not enter into any part of the premises, or hold by color of title, or any claim besides that of a mere occupant. I think the plaintiffs entitled to this instruction in relation to the land flowed at the time defendant entered into possession. The charge of the court assumes that defendant, by entering into the possession of a portion of land and occupying it, had a right to the whole, and that his possession was evidence of his seizin of the whole, and that plaintiffs, failing to show any right to flow the land, were trespassers. But, as I have said, mere occupancy or possession, without color or claim of title, cannot be evidence of seizin, partiularly as against a prior occupant; and without showing title, or a possession under a claim of title, defendant's possession or right by virtue of it, must be restricted to the land he actually occupied.

I am therefore of the opinion that the circuit court erred in its instructions to the jury, and that the judgment below must be reversed and the cause remanded, with instructions to issue a venire facias de novo.

Judgment reversed and venire de novo.

WHIPPLE v. WILLIAMS.

An affidavit that is not correctly entitled in a cause, cannot be used therein.

A writ of error was sued out in the names of W. and R. On motion, W. was allowed to sever in the prosecution of the suit. Affidavits sudsequently drawn up and entitled in the name of W. and R., were held to be erroneously entitled.

Mr. Douglass moved to strike a bill of exceptions from the record. The affidavits he proposed reading in support of his motion, were entitled, "Gardner D. Williams ads. Charles W. Whipple and Theodore Romeyn."

Mr. Davidson, on the part of the plaintiff, objected to the reading of the affidavits, as they were not entitled in the cause. 4 Hill 19.

It appeared that the writ of error was originally in the names of Whipple and Romeyn, but that on the 3d January, 1844, on motion, Whipple was allowed to sever in the prosecution of the suit, and that the affidavits had been drawn up since that time.

By the court. Affidavits must be correctly entitled in the cause in which they are to be used; otherwise an indictment for perjury would not lie upon them, if false. 2 Cowen 509. Notices and other papers are sufficient if they do not mislead. Since the severance there is no such cause in this court as that in which the affidavits are entitled.

Motion denied.

SAVIER v. CHIPMAN.

The statute, Ses. L. 1842, p. 135, S. 4, provides, that no justice of the peace shall hold any court, or hear an examination, in any bar-room, grocery, or other room or place where spirituous or intoxicating liquors shall be sold. Where it appeared from the justice's return that, on the day of trial, the cause was called in the bar-room of a tavern and adjourned to an adjoining room in the same house, but that the justice had no knowledge spirituous or intoxicating liquors were sold there, and no proof of the fact was offered on the trial, the court refused to reverse the judgment.

The court will not presume spirituous liquors are sold in the bar-room of a tavern, when by law *every* license to keep a tavern does not authorize the sale of spirituous liquors.

Facts that come to the knowledge of a justice after the trial of a cause are properly no part of his return, and must be rejected.

ERROR to St. Joseph Circuit Court.

Gurney & Hammond, for plaintiff in error.

Chipman, in person.

By the court, GREEN, J. In 1846, Chipman sued Savier in a justice's court in the county of St. Joseph, and recovered a judgment for $40 damages, and $3 91 costs of suit. Savier, conceiving himself aggrieved by such judgment, made a special affidavit, under the provisions of section 10 of the act of 1845, Ses. L. 1845, p. 101, and appealed therefrom to the circuit court of the county. The cause was tried by a jury in that court, at its March term in 1847, and the plaintiff below obtained a verdict and judgment against the defendant below for $42 45 damages, with costs of suit.

Exceptions were taken on the trial, and a bill of exceptions was settled and signed, and made a part of the record; and the defendant thereupon removed the record into this court by writ of error.

It appears from the bill of exceptions, a motion was made by the appellant in the circuit court to reverse the judgment of the justice, on the ground the return showed the court was held in a bar-room or place where spirituous liquors were sold, and that, therefore, the justice had no jurisdiction; and that the circuit court decided the return did not show that the justice held his court in a bar-room or place where spirituous liquors were sold, and that the question arising upon the return was not one of jurisdiction, but one that should have been taken advantage of, if at all, by plea in abatement, if the facts were disputed, or upon motion to dismiss the action, if the facts were undisputed.

The errors assigned are, that the circuit court erred in denying the motion to reverse for the reasons specified in the bill of exceptions, and also that the justice had no jurisdiction of the case.

The only question involved in the case seems to be, whether the justice's court, before which the suit was tried, was holden in a bar-room where spirituous or intoxicating liquors were sold. Ses. L. 1842, p. 135.

The justice's return shows, that on the day of the trial of the cause it was called in the bar-room of a tavern, and adjourned from that room to one adjoining in the some house, but that the justice had no knowledge that spirituous or intoxicating liquors were sold there, nor was any proof of such fact offered upon the trial. Whatever information the justice acquired upon inquiry afterwards, not having been judicially before him in the case, cannot be regarded here, and should not have constituted any part of his return. Such information may have been true, or it may have been false. It comes upon the record without any sanction making it evidence. Excluding, therefore, all that relates to information derived from the keeper of the house or others, after the trial, the return only shows that the cause was called and adjourned in a bar-room, but not that any kind of spirituous or intoxicating liquors were sold there.

If, under the statute then in force relating to taverns, every license to a tavern keeper authorized the sale of spirituous liquors, it would then seem to be a fair legal presumption that such liquors were sold in every bar-room of a tavern; but by the revised statutes of 1838, p. 206, sec. 23, provision was made for granting licenses to tavern keepers which should not authorize the sale of brandy, rum, or other spirituous liquors or wines. It cannot, therefore, be presumed, from the mere fact that the room in question was the bar-room of a tavern, that it was a bar-room or place *where spirituous or intoxicating liquors were sold.*

This cause having been tried before the justice within the general limits of his territorial jurisdiction, and he having acquired jurisdiction of the cause and of the parties by a regular course of proceeding, any special circumstances which would take away that jurisdiction, ought to appear in the record; and no such circumstances appearing, the judgment of the circuit court must be affirmed, with costs to the defendant in error.

Judgment affirmed.

BROOKS ET AL. v. HILL.

An act was passed by the legislature for the organization of banks, generally, declaring them to be *corporations*, and making the directors individually liable for the debts of the corporation in case of insolvency. So much of the act as purported to confer *corporate* rights on the banks organized under it, was afterwards decided to be unconstitutional. By a prior act, banking was made unlawful unless authorized by law, and penalties were imposed for its violation. In an action brought against the directors of an insolvent bank organized under the first named law, it was held that the act against banking was not repealed by the first named act, except in favor of *incorporated banks* organized under it; and, as by the constitution *corporations* could not be created under it, the banks so organized were illegal, and therefore the action could not be sustained.

ERROR to Wayne Circuit Court. An action of debt was brought by Warren Hill in the circuit court, against Edward Brooks and other directors of the Detroit City Bank. The declaration stated the organization of the bank in November, 1837, under and by virtue of an act entitled "an act to organize and regulate banking associations," approved March 5th, 1837; that Brooks and the other defendants were elected directors, and always were directors of the bank, which claimed to have complied with the provisions of the act and to be a body politic, and on its organization commenced doing business as a bank under the act, and continued the same until the 10th February, 1839, when it failed and became insolvent, and was still insolvent; and that when it failed it was indebted to Hill in the sum of $2,000, for money deposited with it while it was doing business, &c. Hill obtained judgment by default, to reverse which defendants brought the case to this court by writ of error.

Romeyn, for plaintiffs in error.

Seaman, for defendant in error.

By the court, WING, J. The Detroit City Bank was organized under the act of March 5th, 1837, and became subject to the provisions of the amendatory act of the 30th December, 1837.

I shall not attempt to give a synopsis of either of these laws, as this has been done, and a full history of these laws has been given by the court in the case of Green, Receiver *v.* Graves, 1 Doug. Mich. Rep. p. 351.

It may be well to notice a few of the sections of these laws, having an immediate bearing on the question under consideration.

The 9th section of the act of the 5th of March, and the 4th section of the act of the 30th December, provide, that "all such persons as shall become stockholders of any such association shall, on compliance with the provisions of this act, constitute a body corporate and politic, in fact and in name, and by such name as they shall designate and assume to themselves, which name shall not be changed without the consent of the Legislature," &c. This section further declares, that "by this name they shall have continual succession; and shall, in their corporate capacity, be capable of suing and being sued, &c.; may have a common seal and be capable of purchasing, holding and conveying any estate, real or personal, for the use of the said association."

The 21st section provides, that if such banking association shall become insolvent, the directors in the first place shall be liable in their individual capacity to the full amount which such insolvent associations may be indebted; and each stockholder shall thereafter be liable in like manner in proportion to his or her amount of stock, for the payment of the full amount of the debts of such insolvent association.

This suit is brought upon the statutory liability of the defendants in the court below, as directors of the Detroit City Bank, arising under the 21st section. The cause of action is averred to have grown out of dealings with the Detroit City Bank as a bank, and in the exercise of its functions as such. By the terms of the 21st section, the liability of the directors is made to depend upon an indebtedness of the bank, and upon the contingency that the bank has become insolvent; and after their responsibility is exhausted, recourse may be had to the stockholders.

The question is therefore presented, whether there can be a recovery on a contract made with an association organized under the general banking laws. The plaintiffs in error insist that there cannot be a recovery—

1. Because such contract was made by the bank as a corporation, when there was no corporation.

2. Because such contract was made by it as a bank, contrary to the inhibitions of the restraining act of this state.

In the case of Green *v.* Graves, it was decided by this court, that "so much of the act to organize and regulate banking associations as purports to confer corporate rights upon the associations organized under its povisions, is in violation of the 2d section of the 12th article of the constitution of this state, which declares, that 'the legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each house,' and is therefore void."

The defendant in error suggests that this court should review their decision in the case cited, because it was counter to previous decisions, and the decisions of the judges at circuit. The suggestion is very well, and this court would not hesitate to do so in this or any other case, if convinced of their error. But that case was decided upon mature deliberation, and subsequent examinations of these statutes, and a careful examination of the New York decisions, have convinced us that that case was rightly decided, and that the general banking laws were and are void, so far as they purport to confer corporate powers upon banking associations organized under them.

It is manifest from the course of the decisions of the New York courts, and the opinions of the profession in that state, that if the question was now presented to their courts for the first time, disconnected with considerations of public policy, their general banking law would be held to contravene the provisions of their constitution. The history of the decisions of the New York courts upon their general banking law, is, to say the least, quite singular. The supreme court first held, that banking associations organized under their law were not corporations.

The court of errors held, that they were not corporations within the meaning of the constitution; they attempted to establish a distinction between certain money corporations and municipal corporations; but the doctrine having been afterwards established that there was no such distinction, the chief support of their former decision was withdrawn. Shortly afterwards, another case upon the same law was taken to the same court, and they were compelled to yield their former opinion, and admit that these associations were within the prohibition of the constitution; and, though they sustained the law, it was not upon legal principles. See 1 Denio 1.

If, then, the courts of New York have finally adopted such views in reference to their constitution, which is not as strict as ours, and in reference to a law which does not upon its face profess to create corporations, most certainly we cannot but affirm the doctrine of the case cited when applied to a law in which these associations are by an express enactment declared to be corporations. No other case was ever brought before this court where the same question was raised.

The Detroit City Bank was organized as a corporation under our general banking laws. There can be no pretence that it was organized as a partnership, or a joint stock company. The idea that any of these banking associations were partnerships, was never urged from any quarter in this state until after the case of Green *v.* Graves was decided by this court, or at least until about that period. None of these banking associations ever contracted, or professed to contract, with imdividuals or the public as partnerships. The stockholders organized it as a bank, and in the powers which it exercised, and in the manner of their exercise, it exhibited the functions and modes of action of a corporation; and, in the language of the counsel for the plaintiffs in error, it was baptized as such. But as the grant of corporate franchises was not authorized by the constitution, this court declared it to be void. What, then, remained of these associations? They could not exist as corporations, but they maintained in their proceedings all the forms prescribed by the law. What were they? They were joint stock companies usurping the franchises of corporations. They had an actual existence; but was it a legal existence?

It is conceded by the counsel for the plaintiffs, that, as individuals or private partners, its stockholders might have issued promissory notes, or bills of exchange, and received drafts and loaned money; but it is insisted that in this case the contracts were made with them as corporators, professedly and avowedly as such, and that they were consummated as such; that they were made and were received as the contracts of the Detroit City Bank, a corporation—and not Brooks, Brown and others, private partners.

I do not understand that these last propositions are denied by defendant's counsel; neither, indeed, can they be denied. It was a matter well understood by all—both those who composed the associaion, and those who dealt with them—that they professed to be corporators, and were universally treated and dealt with as such, and not otherwise. If so, such transactions were void, at the least so far as these associations are to be considered as corporations. Coll. on Part. 421 to 425; Chitty on Cont. 718, 720, (edition of 1842;) Hall *v.* Franklin, 3 Mees. & Wels. 259; Josephs *v.* Pebrer, 3 Barn. & Cress. 639.

But plaintiffs insist that from this fact the important consequence flowed—that the bank was not exempted from the penalties and restrictions of the act restraining unauthorized banking.

The constitution of this state does not inhibit banking in any form to individuals or associations; it was not illegal at the common law; but by the restraining law of 1833, Laws of 1833, p. 530, and R. S. of 1838, p. 222, it is forbidden to persons to associate together for the purpose of banking, unless authorized by law. Was this done by the general banking law? Of course the legislature had the power to do it; but did they do so?

This question presents the main point in the case of the defendant in error. He assumes the position, that if so much of the general banking law as purports to create and confer corporate powers, is unconstitutional, the remaining part of the law is valid. His position is, also, that the principal end and object of the legislature was not to create corporations; that corporate powers were but a *means* to effect an ulterior object, viz: to supply a paper circulating medium; that corporations are not created for the sole purpose of calling such soulless beings into existence; but as a convenient and proper means of carrying into effect and attaining some other object.

If it can be shown, or fairly assumed, that the general banking laws are substantial modifications of the restraining law, that only so much of these laws as confers privileges that corporations only can possess, is void, and the remainder is valid, we shall be led to the conclusion that the plaintiff must recover.

That a statute may be good in part and bad for the residue, is a sound rule of law, which has often been affirmed by the courts of the United States, of this state, and the English courts.

The same doctrine holds good in regard to deeds and wills. If a man grants more than he owns, the grant will be good for what he owned, and void for the rest.

It is also a rule of construction of statutes, that if an affirmative statute which is introductive of a new law, directs a thing to be done in a certain manner, that it shall not, even though there are no negative words, be done in any other manner.

The intention of the legislature in passing the law, is to be carefully sought in the law itself; and if it can be carried into effect, it is the duty of courts to do so. And granting that it was the object of the legislature to grant greater facilities for organizing banking associations or corporations as a means to increase the circulation of a paper currency, we must carefully examine to ascertain whether the organization of associations was only ancilliary to this object, or whether this object was connected with others, upon which it was made dependent by the law, and without which it was not intended to be accomplished.

The act of March 5, 1837, *assumed to create corporations.* The associations authorized by it not only were to possess the faculties of corporations, but, by the 9th section, they were expressly declared to be bodies corporate and politic. When the corporation was organized in all respects, according to the requirements of the law, then it, the corporation, the body politic and corporate, in its artificial character, and as such artificial person, was allowed to issue bank notes, to receive deposits, and to make discounts. Its action was confined to banking. Business and investments entirely lawful for its stockholders as private partners, were inhibited to them as corporators; and privileges were bestowed upon them as members of a corporation, which by the restraining act were forbidden to them as individuals. Sec. 26, 27.

The corporation, the legal entity, exists separate and apart from its stockholders—it is a distinct person, and must be so regarded. In the case of Moss v. McCullough, 5 Hill 132, Judge Cowen says: "The corporation, an artificial person, is the principal. Independently of the statute, the stockholder is no more liable to be sued than a stranger. The company and he are, in legal contemplation, distinct individuals."

The legislature appear to have had two objects in view: 1. to create corporations; and, 2. to vest in such corporations or artificial persons the franchises of banking. The act did not profess to throw open the business of banking to any and all persons, without restriction; but to allow individuals to form themselves into corporations, and then to permit the corporation to engage in banking.

It is said that there are only six sections in the amendatory act that contain the word corporations, viz: the third, fourth, twenty-fifth, thirty-second, thirty-third and thirty-sixth; that in all the other sections the companies are called banks, banking associations, or such associations; and that in all the provisions in relation to the organization of banks, and their mode of doing business and making contracts, and which confer on them banking powers, it is done by the name of banking associations, and not by the name of corporations. The defendant claims that if those sections containing the designation of corporations were stricken out, it would not affect the substantial banking powers of the associations.

But by the 9th section it is provided, that "all such persons as become stockholders of such associations shall, on compliance with the provisions of this act, constitute a body corporate and politic." When a number of persons assemble together and subscribed to the stock (if to a proper amount), they became an association, and that moment they became a corporation, and are made so by the law. When the association is named in the different sections of the law, such association as is thus declared to be a corporation is meant, and this quality or attribute enters into and becomes a part of its being; the effect is the same as if it was said such association *being a corporation.*

If we are right in this view of the law, it is of no importance to the argument of the defendant's counsel that the term corporation is in fact omitted in any of the sections, since in law it is understood and made a part of all the sections. If the sections containing the word corporation are stricken out, the essential attributes of a corporation are found in the other sections; and the supreme court of New York, in the case of The People v. the Assessors of Watertown, 1 Hill 623, by Judge Bronson say, "It may be true, as has been urged, that the legislature intended to make a legal being, and give it all the essential attributes of a corporation. That, the legislature could not do. I do not refer to any written constitution. The constitution of things, the order of nature, forbids it. Human powers are not equal to the task of changing a thing by merely changing its name."

If, then, there were no corporations having a valid existence under the law, there were no recipients of the proffered franchises of banking, for the grant was to them only upon condition of their becoming organized as corporators, and transacting business as such. Take away their corporate attributes, and what remained of these associations? The privilege of banking was not proffered to Brooks and others as partners, but to them as corporators, constituting an artificial person, contracting and acting as such. They were required to comply with the provisions of the law, before they could engage in banking; and when they had done so, they become, by express enactment, corporations. If they failed to comply with the law in the subscription of stock, or in neglecting to assume a corporate name, could they have claimed the privilege of banking? and if they did these things, they usurped the franchises of a corporation. There was no grantee in this case capable of taking. The privilege was offered to corporations potentially and in name, but the legislature failed to create the corporations.

Conceding, as we have said, that an act may be good in part, and bad in part, the legislature might have repealed the restraining act; if they had done so, and then, by an independent enactment, the creation of an *indefinite* number of corporations had been authorized as a *distinct* provision, the latter would not have invalidated the former. But in this case the good and bad are *inseperably* blended. Nay, the vicious is a condition precedent to what would have been a valid enactment. The restraining act was repealed, not in favor of individuals, but of corporations; and where there were no corporations of the character required by it, it remained in full force.

If these views are correct, what is the effect of the restraining law upon the claim set up in this case?

If the general banking law did not have the effect to repeal the restraining law, then the first step in the organization of these associations was penal. All securities taken by them were void. As nothing is said in the law as to the validity of their issues, this must be determined upon general principles.

The principle is this: The organization of the company being forbidden, and its objects being unlawful, its contracts made in furtherance of the illegal objects by such association, are all tainted with illegality, and cannot be enforced against either party. The law is not satisfied by a payment of the penalty. See the following authorities on this point. 2 Kent's Com. 466; Story's Conflict of Laws 244, 248; Lightfoot *et al.* *v.* Tenant, 1 Bos. & Pul. 551, 556; De Groot *v.* Van Duzen, 20 Wendell 390; Bank U. S. *v.* Davis, 2 Hill 458-9; Jackson *v.* Walker, 5 Hill 30; 1 Maule & Sel. 596; 14 Mass. 322. In the case of Pennington *v.* Townsend, 7 Wendell 276, the check sued on had been discounted in New York by the agents of the New Jersey Protection and Lombard Bank. The opinion of the court was delivered by Judge Nelson, and the conclusion is as follows: "But it is said that the incurring the penalty of $1,000, is the only consequence of a violation of the restraining act of 1818, and that the contract may be enforced as valid; that the transaction is only *malum prohibitum*, and not *malum in se*, and that the former differs from the latter in this, that the penalty is the only punishment or consequence. Castle's case, Cro. Jac. 644, and Rex *v.* Wright, 1 Bur. 543, cited in support of this doctrine, are not authorities to the extent claimed; they establish the position, that where a new offence is created by statute, and a penalty affixed, the punishment for an infraction of the law, can only be in the mode prescribed. The same principle is recognized in the 2 R. S. 696, Sec. 39. Giving full effect to this principle, the civil rights and remedies arising out of the inhibited acts are left untouched, and I apprehend it will be found that so far as these are concerned, there is no distinction between an act *malum prohibitum* and *malum in se*. Both are equally forbidden and unlawful; and I will add, both are immoral, and cannot be the foundation of a civil right that will be enforced in a court of justice. 14 Johns. R. 273. In Thallimer *v.* Brinkerhoof, 20 Johns. R. 397, Ch. J. Spencer says: 'It is a fundamental rule, that all contracts which have for their object any thing repugnant to the general policy of the law, or contrary to the provisions of a statute, are void; for it is a rule as well in law as in equity, *ex turpi contractu actio non oritur.*' In the same case, Mr. Justice Woodworth says; 'An agreement expressly prohibited by statute must necessarily be considered inoperative and void. It will not be seriously urged that the party is subject to the penalty only, and that the courts are bound to consider the contract legal and valid.' The principle had before been avowed, and frequently enforced, that an action in affirmance of an illegal contract, the object of which was to enforce the performance of an engagement prohibited by law, could in no case be maintained. The question has been recently fully examined by the supreme court of the United States, Bank of U. S. *v.* Owen, 2 Peters 527, and in which the distinction urged by the plaintiffs, so far as civil rights and remedies are concerned, is repudiated as unsound. It is said, if the security should be declared void, still the plaintiffs are entitled to recover the money loaned, under the common counts. Whether this principle is applicable at all to this case, I will not stop to inquire, for there is no pretence for its application to this defendant, inasmuch as no money was ever loaned by the plaintiffs to him. Utica Ins. Co. *v.* Cadwell, 3 Wendell 302."

There is another ground upon which this case might have been decided. The defendants in the court below are not declared against as original promisors, but as directors of an incorporated bank, and on a contract of the bank. There being no such body, there can be no directors of it. Defendants cannot be held as sureties of a principal that never existed. Their contingent liability is indissolubly connected with and dependant on the existence of a contracting corporation, apart from the stockholders. Their statutory liability was secondary and subsidiary to that of the principal; and if defendants could be held liable in any form, it would be as original promisors, but they are not declared against as such.

We have decided the broad question as it was submitted by both parties. On either ground, the plaintiff in the court below must fail.

We have not been unmindful of the fact that large interests were involved in this question; that a few bad men will, by our decision, go free with their ill-gotten gains; at the same time hundreds of misguided and innocent men will be relieved from entanglements into which they have been led by the influence and example of others equally honest and innocent, and in whose judgment they confided. As a general thing, one common fate appears to have awaited the banker and his creditor, the deceiver and the deceived—all, or nearly all, are bankrupts.

This is the first time this question has been brought before this court for a decision. We entered upon the examination of it under a full sense of its magnitude and importance. We feel a strong conviction that our conclusions are correct; and this is all we feel it proper or necessary for us to say in reference to our feelings, to the obligations that rested upon us, and the part which we have enacted in the closing scene of this great drama.

Judgment reversed.

WEED ET AL. v. SNOW.

S. being endebted to W. & Co., as indorser on a promissory note, assigned to them as collateral security a mortgage he held against H., which W. & Co. were to collect and apply on the note. W. & Co. advertised the mortgaged premises for sale, under the statute; but, before the day of sale, it was agreed between them and S. that the premises should be bid off at the sale by A. S. W., for the amount due on the mortgage, and that he should hold them in trust for S. and W. & Co.; and that if within one year S. paid W. & Co. what was due on the note, A. S. W. should convey the premises to him, but if not, then he should sell them at public or private sale for what they would bring, pay W. & Co. from the proceeds, and the balance, if any, pay to S. In pursuance of the agreement the premises were bid off by A. S. W. for $572, the amount due on the mortgage. S. failed to pay W. & Co., and A. S. W. advertised and sold the premises, which were purchased by W. & Co. for $25, who afterwards sued S. for the balance due on the note. *Held*, S. could not show in bar of the action that the mortgaged premises purchased by W. & Co. were, at the time of sale, worth the amount due on the note.

CASE reserved from Lenawee Circuit Court. Assumpset against defendant as endorser of a promissory note. Plea general issue. On the trial, by consent of parties, the following agreements were introduced in evidence: An agreement between plaintiffs and defendant, dated Nov. 29th, 1839, which stated that the defendant had that day assigned to the plaintiffs certain notes and mortgages, among which were a note and mortgage against William A. Hawkins, for $394 48, "which several notes and mortgages are intended as collateral security to them for his endorsement of J. D. Palmer & Co.'s note for $498 86, due and payable the 11th January, 1839. The understanding between the parties is this, that the said plaintiffs shall endeavor to collect, by course of law or otherwise, and in their own names, or in the name of said Snow, the money due or to grow due on the said several securities, and apply the proceeds after paying the costs and expenses of collecting, towards the extinguishment of said Snow's liability as endorser of said note of J. D. Palmer & Co., and the surplus, if any, refund to him, said Snow; and that in the mean time all legal peoceedings against said Snow be foreborne." Also an agreement between plaintiffs and defendant, dated May 5, 1842. This last agreement, after reciting the previous assignment and agreement between the parties, and stating that the property mortgaged by Hawkins was advertised to be sold on the mortgage, on the 7th of May, then instant, was as follows: "Now it is understood and agreed by and between the said several parties concerned in this matter, that the said property so advertised for sale under said Hawkins mortgage (when the same shall be offered for sale), may be bought in by Alpheus S. Williams, or other disinterested person, for the whole amount due by said Hawkins on said mortgage and its accompanying note and costs, to whom the deed or evidences provided for by the statute shall be duly made, who shall thereafter hold the said property, or the interest which he may acquire therein, in trust for the said N. & H. Weed & Co., (the plaintiffs,) and the said Fielder S. Snow, (the defendant,) as follows, subject to any equity of redemption or other condition which the law may annex to his purchase, to wit: in trust that if within one year from this time the said Snow shall pay to said N. & H. Weed & Co. the balance which may be due then on said note of J. D. Palmer & Co., and all costs and expenses connected with the same and with said securities, then said Williams, or other person who shall purchase, shall assign and transfer all his right and interest in and to said mortgaged premises which he may acquire by such purchase, to said Fielder S. Snow. But in case the said N. & H. Weed & Co. shall not have been paid, at the end of one year from this time, all the balance which may be due them as aforesaid, and costs and expenses, then the said Williams, or other person who shall purchase as aforesaid, may and shall immediately thereafter, or at such future time as the said N. & H. Weed & Co. may direct, either at public or private sale, as shall be deemed expedient and for the interest of all concerned, sell, assign and transfer all the said property so to be bought in by him, or the interest therein which he may have acquired by purchase as aforesaid, for the greatest price in cash which he may be able to obtain for the same; and the proceeds of such sale, or redemption of the property, (should the property before such sale be redeemed,) after deducting costs and expenses, pay to said N. & H. Weed & Co., towards the liquidation of said indebtedness of said Snow to them, and interests, costs and expenses; and the surplus, if any remaining, pay over to said Snow. It is the intention of the parties concerned, that the liability of the said Snow to said N. & H. Weed & Co. shall not be affected or impaired by the sale of the mortgage property contemplated to be made under the said Hawkins mortgage by advertisement as aforesaid. But said advertisement and sale are intended as well for the protection of said Snow against the insolvency of said Hawkins, as to facilitate the collection of said N. & H. Weed & Co.'s claim against said Snow; and the said N. & H. Weed & Co. shall be at full liberty, at the end of one year from this time, to call upon and proceed against the said Snow for any balance of his said indebtedness, and costs and expenses, which may then be remaining due and unpaid."

In pursuance of this agreement, the property in the Hawkins mortgage was bid off by A. S. Williams, on the day of sale, for $572, the amount due, including costs. Snow did not pay N. & H. Weed & Co., and the property was advertised by Williams for sale at auction, on the 21st June, 1845, on which day it was put up at auction, and sold to N. & H. Weed & Co. for $25. Defendant then called a witness, by whom he offered to prove that the property, at the time of the sale and purchase, was worth the amount due the plaintiffs on the note, on which the suit was brought. This evidence was objected to, and the objection sustained; and, under the charge of the court, a verdict was rendered for plaintiffs. Defendant moved for a new trial, which motion was reserved for the opinion of this court.

Baker and Millerd, for plaintiffs.

Tiffany and Beaman, for defendant.

By the court, WHIPPLE, C. J. The motion for a new trial is founded upon an objection taken by the defendant to the ruling of the court, by which evidence, touching the value of the real estate described in the Hawkins mortgage, was rejected.

It was then and is now contended, that it was competent to prove that the property was in fact worth the full amount specified in the note, and thus extinguish the debt.

In support of this position, it is urged that the transaction was in the nature of a mortgage; and that, if a mortgagee of real or personal property take the mortgaged property, it is a satisfaction of the debt, if equal in value to the debt it was intended to secure. Under the agreement of November, 1839, the mortgage and notes therein mentioned were assigned to the plaintiffs, as collateral security for the payment of Palmer & Co.'s note, endorsed by the defendant. The plaintiffs were, under the agreement, to collect the amount due on the securities thus assigned, and apply the proceeds to the liquidation of the note. By the agreement of May, 1842, Alpheus S. Williams was authorized to purchase the mortgaged premises described in the Hawkins mortgage, for the full amount due on the note which the mortgage was intended to secure, and the costs of foreclosure. It was further provided, that Williams should hold the property in trust, as well for the plaintiffs, as for the defendant; and if the defendant, within one year, paid the amount due on the note of Palmer & Co., and certain costs, then Williams was authorized to convey to him all his right, title and interest in the property. It was further provided, that in the event that the defendant failed to pay the several sums above specified, then Williams was authorized to sell the property at public or private sale, and after satisfying the note, costs, &c., to pay any surplus that might remain in his hands to the defendant. It was further stipulated between the parties, that at the expiration of one year the plaintiffs were at liberty to proceed against the defendant for any balance that might be due then on the note.

The assignment of the mortgage gave to the plaintiffs full power and authority to foreclose the equity of redemption of Hawkins; it was, in legal contemplation, as well a mortgage of the debt as of the power of sale. If the mortgaged premises had been sold under a statutory foreclosure, to a stranger, the defendant could not claim a right to redeem;

and if the premises had sold for an amount less than the debt due by defendant to the plaintiffs, the latter would have had a claim upon the former for such balance. The assignment, however, being in the nature of a mortgage, such a foreclosure would not operate as a foreclosure of the mortgage thus created by the assignment; this would remain open to redemption by the assignor. This equity of redemption, however would in such case attach, not to the land, but to the money for which the land was sold. But if the mortgagees of the mortgage become the purchasers, the assignor's equity of redemption attaches to the legal estate; this legal estate passes on the execution of the assignment, and remains unchanged by a foreclosure; the only effect of which is to divest the orignal mortgagor of his equity of redemption. If, therefore, the mortgaged premises had been sold by the plaintiffs under the agreement of November, 1839, the rights of the parties would have been determined by the rules I have stated. But in May, 1842, after the property was advertised for sale, the parties enter into a new arrangement, and Williams becomes the purchaser, at the sum of $572. Williams thus became vested with the legal estate, charged with the trusts created by this last agreement. By that agreement, he is declared a trustee for the benefit of both parties. The legal rights of the parties under the agreement of 1839, were changed by the agreement of 1842. The defendant, instead of permitting the plaintiffs to foreclose, and in the event of their becoming the purchasers, insisting upon his right to redeem, waived this right, and assented that Williams might become the purchaser, with the understanding that if he paid Palmer & Co.'s note, Williams was to convey the estate to him; but if he failed to pay, then Williams was at liberty to sell the property, and apply the proceeds to the liquidation of the debt owing by the defendant to the plaintiffs. Williams did sell, and the monies arising from the sale were applied according to the terms of the agreement. Whether a court of equity would consider the plaintiffs, having become the purchasers, as holding the property subject to any equitable rights of the defendant, it is unnecessary to determine—a court of law can give no relief. The bid, therefore, made by Williams, cannot, under the facts in this case, be considered as a payment on account of Palmer & Co.'s note. Such a decision would contravene the express terms of the agreement made by the parties; it would, in effect, be making a new agreement for the parties. The object of the agreement was to benefit the defendant, who probably foresaw that if the property was sold at the time designated in the advertisement, but little would be realized from the sale, and his indebtedness to the plaintiffs inconsiderably reduced; whereas, if the property was held for a year, he might pay the debt, and thus obtain title to it; or if driven to the necessity of having it sold, a greater amount might be realized.

After a careful review of the facts, I am unable to perceive why testimony should have been received touching the value of the property. The first ground assumed by counsel is certainly untenable, if the relation existing between the parties has been correctly defined. As an assignor of the mortgage, he certainly had rights; the nature of those rights has already been stated. But he permitted the mortgage sale to take place under the agreement of 1842, by which rights reserved under that of 1839 were waived. Williams did not sell mortgaged property; but he sold property vested in him by virtue of the mortgage sale, under an agreement made between the parties. By that agreement, the defendant virtually waived his right to redeem in the event of the plaintiffs becoming the purchasers under the mortgage sale; and acquired new rights: that of obtaining from Williams a title to the property, upon payment, within one year, of the debt due the plaintiffs. Not having paid the debt, the property was sold by Williams to the plaintiffs, for $25.

That the debt was paid, from the fact that the mortgaged premises were struck off to Williams for nearly, if not quite, the amount due on the note, would certrinly be inequitable, and would defeat the obvious intention of the parties, as expressed in the agreement of 1842. To permit the defendant to give in evidence the present value of the property to extinguish the debt, would equally defeat the object and purpose of that agreement. By it, the amount for which the property sold was to be offset against the defendant's indebtedness—not its value several years afterwards, and when suit is instituted for the purpose of recovering any balance that might be due on the note, after deducting the amount realized at the sale. This sale was not the foreclosure of a mortgage. The principles which define the rights of parties circumstanced as they were under the agreement of 1839, are inapplicaple when considered with reference to the agreement of 1842, under which the plaintiffs purchased. At all events, we cannot relieve the defendant under his misfortunes; if he has any remedy, it is in a court of equity.

The suggestion that the evidence is admissable to show the sale fraudulent, is equally untenable. If fraudulent, the remedy of the defendant is clear. His course is to resort to a court of chancery, where questions of this nature can be fully investigated, and where the rights of all parties can be most effectually protected.

But in a contest upon the note in question, it would appear somewhat extraordinary if a collateral issue, in which parties other than those on the record are concerned, should be tried. Upon such an issue, the trustee, mutually chosen by the parties to this suit, would be vitally interested; we are not disposed to try him without giving him an opportunity to defend.

If there has been fraud, a court of equity will relieve the defendant; we can give no relief in the present suit.

It must be certified that the motion for a new trial should be overruled.

Certified accordingly.

PEOPLE EX REL. REYNOLDS *v.* JUDGES OF MACOMB CIRCUIT COURT.

A party who has stayed execution on a judgment against him in a justice's court, cannot afterwards appeal.

MOTION for a madamus.

Terry, for the motion.

D. C. Walker aud Hand, contra.

By the court, WING, J. Judgment was recovered before a justice of the peace against the relator, who thereupon gave security for stay of execution; and thereafter, and within five days from the rendition of judgment, gave notice of his intention to appeal the case to the circuit court, and entered into a recognizance therefor. The circuit court ruled that no appeal could be taken from the judgment under such circumstances, and refused to allow the appeal to be entered; and the relator now moves this court for a mandamus directed to said court, commanding them to allow the appeal to be entered.

The 9th section of the justices' act of 1841, provides, that any party to a judgment rendered by a justice of the peace, conceiving himself injured or aggrieved by such judgment, may appeal to the circuit court; and the 95th section provides, that the party appealing, his agent or attorney, shall, within five days from the rendition of judgment, enter into a recognizance, with at least one sufficient surety, conditioned to prosecute such appeal.

By the 77th section of the same act, it is provided, that no execution shall issue on any judgment rendered by a justice, except, &c., if the judgment debtor shall, within five days after the rendition of the judgment, give security in writing, with one or more sureties, satisfactory to the judgment creditor or the justice, for the stay of the execution and for the payment of the debt or damages, with the interest thereon, and costs, in three months, &c.

By the 78th section of the same act, it is provided, that when execution shall have issued within five days after the rendition of judgment, if the defendant shall, within the five days, give security, the execution shall be returned, and the property or body of defendant, if taken upon it, shall be released.

It is provided in section 73 of the same act, that in all cases where security is given for stay of execution, if the debt or damages, and the interest thereon, together with the costs, shall not be paid within the time limited by law for such stay, execution shall be issued by the justice, on application of the judgment creditor, or his agent, against both principal and surety, in the same manner as if judgment had been entered against both such defendant and surety on return of process personally served.

The relator, for the purpose of staying execution on the judgment rendered against him, gave security, under the provisions of the 77th section. He had, during the five days next after the rendition of the judgment, the option of staying execution, or of appealing; he could not do both—for the one is inconsistent with the other. And shall we say the last act in this case should be the only operative and effectual act? It could not have been the intention of the legislature to give to the judgment debtor the privilege of sporting with the rights granted to him. If, for any cause, he did not obtain justice, he could appeal; if satisfied with the judgment of the justice, he could delay the execution by giving security. Abundance of time is granted for deliberate consideration, with the full privilege of choice between the two expedients afforded him by the statute. The statute does not, in express terms, impose any restriction in either case, nor make it a condition that he may do the one act if has not done the other; neither does it provide that if he elects to adopt one course, he may subsequently avoid it by the adoption of the other. He has two absolute unqualified rights—he cannot effectually exercise but one. The relator, by entering stay of execution, in effect admitted that the judgment was right, and the debt honestly due to the respondent. He has entered into a formal written engagement, together with his surety, that the debt shall be paid within a specified time. By this act, a new party is added to the judgment; and by it, and as a compensation to the respondent for the indulgence granted to the relator, additional security is acquired for the payment of the debt. The respondent had not the power to control the choice of the relator; but when once his choie is made, and the security is given, it becomes like a recognizance, a solemn undertaking, a statutory judgment acknowledged to the respondent, who is a party to it, and without whose consent it cannot be annulled. See Schenck *v.* Lincoln, 17 Wendell 506. The security cannot appeal, he must pay the judgment if the relator fails to do so. Shall it be said that this liability is subject to the right of appeal by the relator; and that if an appeal is taken, the judgment against the surety is canceled? As against the relator, and before he had given security, the effect of an appeal would have been to open the judgment and grant a new trial. 17 Johns. R. 131. But after he has made his election, and the security has been given, does it vacate the security? The statute does not so declare. If allowed, would it not operate as a surprise upon the judgment creditor? After he knew security was given, would he probably inquire if an appeal had been taken?

It is our duty to give such construction to the act as will harmonize its different provisions, and preserve the rights of parties, as well plaintiff as defendant. I think this can be accomplished by holding, as this court does, that the relator, by filing security, has made his election, and is estopped from further litigating the justness of the respondent's claim.

In the case of Nealy v. Sexton, Wright's R. 314, the same question was presented, and it was decided that a party against whom there is a judgment, may stay execution and appeal also; that a party may desire to stay execution, in order to obtain counsel as to the propriety of appealing, and thus save the expense of taking his property or body in execution.

By the laws of Ohio, the judgment creditor might issue execution the moment judgment was rendered. By the 77th section of our act this is prohibited, except in one case, until after the expiration of five days; so that there is not the same necessity for giving stay to get time for reflection, with us as in Ohio. Again, in Ohio the surety for stay of execution enters into a recognizance, and if the debt is not paid at the time specified in the recognizance, execution does not issue against the principal and surety, as with us, but suit must be brought on the recognizance, as in other cases.

Motion denied.

PEOPLE v. COLLIER.

An indictment for perjury must aver the false allegation was material to the matter in question, or it must clearly appear from the indictment to have been so from the statement alleged to be false.

Where an indictment for perjury stated, "it became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to," stating what defendant swore to, the averment was held insufficient.

An innuendo is bad when there is nothing previously stated to which it can refer.

R. S. 1838, p. 639, sec. 2, does not make that perjury which is not material to the issue.

Case reserved from the District Court for the county of Jackson.

H. N. Walker, attorney general, for the people.

Joy, for defendant.

By the court, Wing, J. It is alleged, among other reasons, in arrest of judgment, that there is no sufficient averment of the materiality of the alleged false testimony or matter falsely sworn to by the defendant, to the question or matter which was the subject of inquiry before the justice.

The indictment alleges, in substance, that a complaint was made against one Allen Boyce, charging him with having stolen a bay horse and one mule, the property of one Benjamin L. Collier (the defendant); and that the matter came on to be heard and determined, and that the defendant was in due form of law sworn as a witness. There is then inserted in the indictment the following averment: "*and then and there upon the hearing of the said complaint, it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said Benjamin L. Collier, upon his oath.*" This averment is inserted in both counts of the indictment, immediately preceding the statement of the matters alleged to have been falsely sworn to; and this is the only averment to be found in either count, in relation to the materiality of the evidence given by defendant to the matter pending and in question before the justice.

It is a well settled rule, that it must appear on the face of the indictment that the false allegation was material to the matter in question; for if it be of no importance, though false, it will not be perjury; for, as it does not concern the issue, it is extra-judicial in this respect. 2 Chitty's Crim. L. 305. If it must be material, it must be averred to be so, or it must clearly appear to be so from the statements alleged to be false.

In stating the question which is averred to be material, it is proper to mention the circumstances, which must afterwards be connected with the terms of the defendant's oath, in order to assign perjury upon that meaning. The usual form, when an express allegation of materiality is made, is, that it became a material question whether such a thing happened or existed. In this case it might have been, whether a certain bill of sale, executed by Boyce to Collier, was executed for such and such purposes; whether by it a certain horse was conveyed or sold to Collier; and whether he had said so and so about it. The materialty of the question must be raised by the issue, and must have existed at the time the inquiry is entered upon and before the witness gives his evidence. The supposition of the count is, that the evidence is false; therefore, if the defendant be guilty, his allegations had no foundation in fact; nor does it appear, even in suggestion, till he gave his evidence; and when he had given his evidence, it became material to ascertain the truth of what he had stated; but it is not stated that he gave any evidence after it became material. In the case of Regina v. Goodfellow, 1 Carrington & Marshman 569 (41 Eng. C. L. 310), the indictment contained the same averment. The court says, "As to the allegation of materiality, I am of the opinion that the allegation is clearly bad. It seems to me it is quite absurd to say, it became material to ascertain the truth of what the witness stated; the witness' statement itself must be given to ascertain the truth of something which has become material to the inquiry before the statement has been made."

It is then stated in the indictment, that the defendant "did depose and give in evidence to the effect following, that is to say, that he, the said Benjamin L. Collier, did not, in conversation with one Charles Boyce, tell him, the said Charles Boyce, that bill of sale [referring to a bill of sale executed by the said Allen Boyce to the said Benjamin L. Collier, then and there produced, and proved and read in evidence, before the said John Ganow, as such justice of the peace, on the hearing of the matter of the said complaint, and which, amongst other things, purported to convey from the said Allen Boyce to the said Benjamin L. Collier the goods and chattels alleged to have been stolen in the said complaint], was intended as a collateral security for the payment of the amount the said Allen Boyce was indebted to him," &c.

The subject matter of the bill of sale is introduced into the second count in the same way, and all the evidence of defendant is stated to have been in reference to it. There is no prefatory statement to which it refers. The innuendo embraces all that is stated in the indictment in relation to Collier's interest in or title to the horse. All his evidence relates to the validity of the bill of sale, when executed, what he had afterwards said concerning it, and what was intended by it. This is the first time the bill of sale is mentioned in the indictment—nothing is previously said in relation to its materiality to the question to be determined by the justice. But for the innuendo, it would not apper that it related to a horse. Can the innuendo have the effect which is claimed for it? Mr. Chitty explains the office of an innuendo as follows: "It is a mode of explaining some matter clearly expressed; it serves to point out when there is precedent matter, but can never introduce a new charge; it may elucidate what is already averred, but cannot add to, or enlarge or alter its sense; and, therefore, if it be intended to explain any thing, the matter must first be put upon the record for it to explain. Thus the words, he has burned my barn, cannot, by innuendo, be taken to be a barn full of corn; but, if it had been stated before, by way of inducement, that the owner had a barn full of corn, and then the innuendo had referred to it as such, the meaning would have been complete." 2 Chitty's Crim. L. 310. So in this case, if the subject matter of the bill of sale had been set out in the prefatory part of the indictment, and it had been averred that it became material to ascertain, &c., and thus made it proper to refer to it, it might have been done by innuendo. We think the innuendo bad. There is nothing previously stated to which it can refer. We have seen it cannot add a new charge as in this case. Here the nature of the bill of sale, its substance, its effect and bearing upon the case before the court, is all contained in the innuendo. Without the explanation afforded by it, the evidence of Collier would be unintelligible; and therefore, as some use is made of the innuendo, which is imperfect, it cannot be rejected as surplusage. 2 Chitty's Crim. L. 310, 311; 1 Ld. Raym. 256.

It does not appear from the indictment, that the evidence was given by defendant on a cross-examination, and we cannot, in a case like this, infer that it was: as all the facts necessary to show its materiality must appear upon the face of the indictment.

The whole of the evidence given by the defendant relates to matters (so far as appears) collateral to the question before the court, which was whether Boyce had stolen defendant's horse, and not in relation to a bill of sale, which does not appear to have any connection with or relate to a horse. The defendant is not charged with having testified in relation to a horse; his evidence is confined to a bill of sale, and what he has or has not said about it to different persons. And even if it was averred that the evidence was given upon a cross-examination—as it appears to relate to a collateral matter, it could not lay the foundation for an impeachment, and therefore it could not be material in this respect. 1 Stark. Ev. 164.

The attorney general refers to the Revised Statute of 1838, page 639, and, as I understand him, insists that it changes the rule in relation to the materiality of the testimony to the matter in question before a court; but the statute does not make that perjury which is not material to the issue. The statute says, if any person, of whom an oath shall be required by law, shall wilfully swear falsely in regard to any matter or thing, respecting which such oath is authorized or required, he shall be guilty of perjury. This statute embraces cases which before were not embraced by law, but it does not in any way change the rules regulating the mode in which indictments for perjury are to be framed.

The result of our examination of this case is, that the averment referred to is not well made; that the innuendo stated above is improper, and not in conformity to the rules of pleading in such cases; and that, in the absence of the averment and the innuendo, the materiality of the testimony of defendant, upon which perjury is assigned, is in no wise apparent from any other portion of the indictment; and, therefore, that the indictment is bad, and will not sustain a conviction, and judgment must be arrested. We do not deem it necessary to notice the other objections.

Let it be certified to the circuit court of the county of Jackson, in which said case is now pending, that the law of the case is with the defendant upon the point submitted and noticed by this court.

Certified accordingly.

THE PEOPLE *v.* JEROME.

It is not libelous to write and publish of and concerning one who is a druggist, "The above druggist in the city of Detroit refusing to contribute his mite with his fellow merchants for watering Jefferson Avenue, I have concluded to water said Avenue in front of Pierre Teller's store, for the week ending June 27th, 1846."

CASE reserved from Wayne District Court.

J. M. Howard, for defendant.

By the court, WING, J. An indictment was presented to the district court for the county of Wayne, at the December term of the court in the year 1846, against defendant, Edwin Jerome, for an alleged libel on Pierre Teller, to which a general demurrer was filed. Upon the argument of the demurrer, the following questions were made, viz:

1. Is the published matter set forth in said indictment libelous?
2. Is the same set forth in said indictment with legal certainty?

The presiding judge of the district court deeming these questions of sufficient importance to have the same submitted to this court for its opinion thereon, did accordingly certify the same to this court.

The charge made against Pierre Teller in the supposed libel, is, that he "the above druggist in the city of Detroit refusing to contribute his mite with his fellow merchants for watering Jefferson Avenue, I have concluded to water said avenue in front of Pierre Teller's store, for the week ending June 27th, 1846." This embraces all that is said of Mr. Teller personally.

The general rule, that a libel upon an individual is "a malicious defamation, expressed either in printing or writing, and tending to blacken the memory of one that is dead, or the reputation of one that is alive, and expose him to public hatred, contempt or ridicule," is plain and easily understood; but its application, in the most of the cases which have been presented to the courts, has been found to be difficult. There are many cases in which the rule does not furnish a sure guide; and this, to my apprehension, is one of them.

Only the latter part of the rule can be supposed to have any bearing upon this case. Does the publication tend to expose Mr. Pierre Teller to public hatred, contempt or ridicule?

It is said that where there is no imputation upon the moral character, no words of ridicule or contempt, and nothing which can affect the party's reputation in life, it is no libel. An illustration of this rule is found in Robinson v. Jermyn, 1 Price 11. The defendant published of and concerning the Reverend John Robinson, as follows: "The Reverend John Robinson and his brother, James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, they are excluded this room." The libel was published in the Casino Room, by posting it on a paper. It was held that the paper and the mode of promulgating it, did not amount to a libel: 1. Because it did not, by any necessary or probable implication, affect the moral fame of the party. 2. That it was the regulation of a subscription assembly, and the paper might import no more than that the party was not a social and agreeable character in the intercourse of common life. 3. That the words charged him with nothing definite, threw no blame on his reputation, and implied no unfitness for general society. The same reasons will apply to this case. The statement does not assert or imply that Teller was under a legal, moral, or even honorary obligation to contribute his mite with his fellow merchants, to water Jefferson Avenue. All that can be inferred from the statement is, that the merchants on the avenue had united, or had proposed to unite, in watering the avenue, and that Teller had refused to unite with them. The proposition, for ought that appears, was a new one—there was no obligation resting upon Teller to join in the furtherance of this project. It was addressed to his discretion—it was not a work of necessity; and if a matter of taste or general convenience, all the inhabitants of the city were alike interested in it. The position of Teller did not make it any more incumbent on him to assist in this measure, than it was upon any other citizen who might desire to walk or ride on the avenue, free from the annoyance of dust. If, then, there was any motive which could prompt to such liberality on the part of merchants, and which was peculiar to them, it was their personal interest, in being able to expose their goods upon the side walk without their being soiled by dust: they, in an especial manner, reaped the advantages to be derived from watering the street. Those of them who preserved their goods unsoiled would present greater attractions to purchasers than those who allowed them to be covered with dust. How was Mr. Teller to participate in this peculiar benefit, since drugs and soda water are not usually exposed to the open air? He would derive no greater benefit from the wetting of the street, than any other citizen doing business or residing upon the street. The merchants, guided by their views of their peculiar interest, did what they thought would promote it. If the dust was kept down, their goods would be preserved in good order; whereas, if the dust was permitted to rise and float in the atmosphere, and be drawn into the throats of the good people passing to and fro upon the street, it would be likely greatly to promote the sale of Mr. Teller's soda water. He refused to contribute his mite: and if this was not commendable, at the least, it is obvious it was his right to do so; and I cannot see how the charge has any tendency to *expose him to public hatred, contempt or ridicule;* and surely it does not fall within any other branch of the rule I have stated.

The defendant, having stated what Mr. Teller refused to do, proceeds to state what he has been advised to do, and what he will do, and that he will receive his pay according to the proposition of sundry persons. He does not again allude to Mr. Teller; his expectations are from the public. All that is said in the publication, besides the statement in relation to Mr. Teller's refusal to contribute his mite, &c., relates to the defendant himself—it does not bear upon Mr. Teller.

In this country, and particulary in this western country, great latitude has been allowed to individuals in speaking and writing "of and concerning" private and public characters; and though it is not pretended that by this habit a new rule has been established, or the effect of the old rule has been destroyed, yet it may be doubted if it has not been much weakened. There are many scurilous epithets, which scholars and gentlemen seldom, if ever, use, but which it is the province and habit of the vulgar to apply, as well to the good as to the bad—not doubting that in this land, where the largest liberty of speech is guarantied to all by the constitution, where our laws and the conventional rules of society are moulded and changed by the influence of public opinion, spoken or written, that ridicule is as innocent, if not as powerful, a mode of conveying to the mind public sentiment or opinion, as any other. It is not to be doubted that it is allowable, by speaking, writing or printing, to ridicule to some extent the acts and opinions of public men, and also private individuals, when their acts are connected with public measures. The great difficulty consists in defining the boundary between what may, and what may not, be said or written, without subjecting the person so speaking or writing to a public prosecution.

In this case, there is no moral delinquency charged upon Teller; nor can I see that what is said of him implies any unfitness for general society, or that it tends to expose him to public hatred, contempt or ridicule, particularly in the first part of the publication. And if there is in any part of it any thing tending to expose any one to public hatred, contempt or ridicule, the defendant, and those persons who proposed to pay him by penny contributions, and those who so contributed, had it all to themselves.

The matter is not set forth with legal certainty in the indictment.

There is no prefatory averment that Pierre Teller is a merchant, a druggist, a keeper of a soda fount, or is engaged in any particular business of and concerning which the statements were made.

We are therefore of the opinion, that the matter set forth in the indictment is not libelous; and if it is, it is not set forth with legal certainty in the indictment; but looking upon the statement as not libelous, we do not think it necessary to examine the structure of the indictment with much particularity.

Certified accordingly.

Brooks v. Delrymple.

In an action in a justice's court against defendant for falsely representing himself to have title to a piece of land, which plaintiff was induced to purchase of him, it was held, the title to the land must necessarily be drawn in question, and that the justice, therefore, had not jurisdiction of the case.

Where there are two issues—the general issue, and an issue on a special plea—and the jury find a verdict for plaintiff on the general issue, but rendered no verdict on the other issue, the judgment will not be reversed, if the verdict on the general issue negatives the special plea of defendant on which the other issue was joined, and the jury could not have found for plaintiff had defendant established his special plea.

ERROR to Berrien Circuit Court.

Bacon, for plaintiff in error.

Dana, for defendant in error.

By the court, WHIPPLE, C. J. From an examination of the record, it appears that Dalrymple commenced a suit against Brooks, in the court below, to recover damages for an alleged fraud in procuring certain property and a promissory note.

The declaration contains three counts, differing somewhat in the statement of the manner in which the fraud was perpetrated, yet unquestionably relating to the same transaction. A brief statement of the first count will sufficiently indicate the character of the others.

It is alleged that the plaintiff was the owner of a piece of land containing about sixty acres, on which he had paid the taxes assessed thereon, according to law; that the defendant, well knowing that the plaintiff was unlettered, and unable to read or write, fraudently represented to him that he had a deed and valid tax title to the sixty acres of land—that he had been offered $300 for it, and that he would sell the land unless the plaintiff would give him $150; that the plaintiff, ignorant of the nature of tax titles and of the falsehood of the representations, and induced by the threatened loss of his land, paid to the defendant $85, or its equivalent, for his pretended tax title; that in fact the defendant had no just title or claim to the land, and the pretended deed was of no binding force or effect.

To the declaration, the defendant plead the general issue, and two special pleas. The first special plea alleged, in substance, that the plaintiff impleaded the defendant before a justice of the peace for the same cause of action mentioned in the plaintiff's declaration; that upon hearing the proofs and allegations of the parties, the justice adjudged, "that the said plaintiff should go thereof without day, and that the defendant recover against the said plaintiff $10 29, costs," &c. The other special plea differs from the first in this, that it is averred that the suit was commenced before the same justice, but that a jury was empanneled to try the issue, who returned a verdict of "no cause of action;" that thereupon the justice "determined and adjudged that the said plaintiff should go thereof without day, and that the defendant do recover his costs," &c. Appended to the pleas was a notice, embracing the same matters set out in the special pleas. To the special pleas the plaintiff replied, in substance, as follows: "And the said plaintiff, as to the pleas by defendant *secondly* and *thirdly* above pleaded, says, the plaintiff did not implead the defendant &c. for the same identical cause and causes of action," &c. "And the said plaintiff, as to the plea of the defendant by him *thirdly* above pleaded, and the matters, &c., says, that no verdict or judgment thereon was rendered in said justice's court," &c., and concludes with an issue to the country. The record further discloses that the plaintiff below, on the 10th October, 1844, filed with the court an amended replication, in substance as follows: "And the said plaintiff, as to the plea of the defendant by him *secondly* above pleaded, &c., says, *precludi non*, because, he says, that the judgment of the court before the justice of the peace, in that plea mentiond, was a judgment of nonsuit," &c., and concludes with a verification.

A verdict was rendered in favor of the plaintiff below, for less than $100 and costs of suit, to reverse which the writ of error in this cause is prosecuted. The errors assigned are: 1. That the verdict and judgment being for a less sum than $100, a judgment for costs should have been rendered in favor of Brooks. 2. That the jury rendered no verdict on the issues secondly and thirdly joined between the parties.

By the justices' act of 1841 (Sess. L. 1841, p. 81, sec. 1), original jurisdiction is conferred on justices of the peace in all civil actions wherein the debt or damages demanded do not exceed the sum of $100, excepting real actions, &c., and actions in which the title to real estate shall come in question. An examination of the record shows very conclusively that the title to real estate was involved. The fraud charged upon the defendant below, consisted in representing himself as having title to the land described in the declaration; upon this representation, the plaintiff below parted with his property, and executed the promissory note also set forth in the declaration. It was, therefore, incumbent on the plaintiff, upon the trial in the court below, to show the falsehood of the representation; to do this, he must necessarily have shown that the defendant had in fact no title to the land. It is clear, therefore, that the title of the defendant below to the land in question, must have been drawn in question, and that the justice of the peace had no jurisdiction of the case.

The second allegation of error must have been founded on a misconception of the state of the pleadings. The *second* plea was no answer to the declaration; it avers that judgment was rendered as in case of nonsuit, and was, therefore, no bar to a second suit for the same cause of action. The third plea avers that the jury returned a verdict of "no cause of action," and that thereupon judgment as in case of nonsuit was rendered. This last plea might be regarded as good, inasmuch as a verdict upon the merits, rendered by a jury before a justice, would have the same force and effect as a judgment rendered by a justice, when the merits are tried without the intervention of a jury. A verdict of "no cause of action," being sufficient, the words which follow may be rejected as surplusage. The replication is bad; but it is, perhaps, good enough for the pleas. The plaintiff, in his replication to the *second* and *third* pleas, avers that he did not implead the defendant for the same identical cause of action; and then, as to the third plea, says, that no verdict or judgment thereon was rendered in said justice's court. The plaintiff might well have disregarded the second plea, as it simply averred that a judgment of nonsuit was rendered against the plaintiff by the justice, which constituted no bar to another suit for the same cause of action. In respect to the *third* plea, the replication gives two answers: 1. That the plaintiff did not implead for the same identical cause of action. 2. That no verdict or judgment was rendered in the justice's court. Upon which of these propositions the plaintiff intended to rely, does not appear—the record is silent on the subject. The next feature in this masterly exhibition of special pleading, is to be found in the amended replication filed on the 10th October, 1844. How this paper got on the record, we are not advised; we are bound, however, to suppose it rightfully there—more especially as the defendant in error, in his *brief*, says, that by leave of the court, a new replication was filed. This replication purports to be an answer to the second plea, and avers that the judgment rendered before the justice was a judgment of nonsuit. In other words, the amended replication admits precisely what the plea states, to wit, that there was a judgment of nonsuit rendered before the justice. It is to be noticed, that this amended replication takes no notice whatever of the third plea, which plea, if true, constituted a bar to the action. Nor does it conclude with an issue to the country, but with a verification. To this replication there was no rejoinder, nor was any necessary, inasmuch as the replication purported to reply to the second plea, which was a mere nullity. Having sketched the somewhat remarkable history of the pleadings in this cause, we are now prepared to determine whether the second allegation of error is well founded. There is some doubt as to whether the amended replication was intended to supersede the first replication, or whether it was intended simply to remedy the difficulty apparent in the first replication—that difficulty consisting in the fact that, in attempting to reply to the second plea, it purports to give a partial answer to the third plea. It seems to be a more sensible view of the question, to consider the amended replication as simply an answer to the second plea—leaving the replication to the third plea to stand. The issues, then, on the record to be tried, were: 1. The general issue. 2. The issue formed upon the matters contained in the defendant's third plea. The record shows a verdict for the plaintiff on the first issue, but is silent as respects the second. This objection will be decisive of the case, unless the finding of the jury on the plea of the general issue, negatives the special plea; if such be its legal effect, then the jury did, in effect, pass on the issue joined on that plea. It seems to me very clear that the jury could not have found for the plaintiff on the plea of the general issue, if the defendant had successfully established his special plea. A verdict *for the defendant on that plea*, would have authorized a court in directing a verdict for the defendant on the first plea, the general issue, for the obvious reason that such finding necessarily implied that the plea must have been supported, and, if supported, it constituted a perfect defence to the action; and the failure to find for the defendant on the first issue, would be mere matter of form. Thus, if in assumpsit there be a plea of non-assumpsit and payment, and a verdict for the plaintiff on the first issue, judgment may be entered for the plaintiff, although the plea of payment remain undecided: so a verdict for the defendant on the plea of *payment*, will be sufficient, although the record shows no finding on the plea of the general issue. If, in an action of replevin, there be a plea of *non cepit*, and property in the plaintiff, or a stranger, a verdict for the plaintiff on the first plea, would not be sufficient, for the reason that such a finding would not necessarily negative the other plea; there would, in such case, be no inconsistency in finding for the plaintiff on the first plea, and for the defendant on the other.

Upon the whole, there are errors enough apparent on the record, but none of so weighty a character as to authorize a reversal of the judgment.

Judgment affirmed.

ENGLE, ADMINISTRATOR, ET AL. *v.* SHURTS.

Where a penal statute is repealed, without a reservation or saving clause in favor of penalties that had accrued under it, such penalties cannot afterwards be recovered.

APPEAL from the Court of Chancery. Shurts, on 20th April, 1843, filed his bill in the court of chancery to foreclose a mortgage executed to him by Engle, deceased, in August, 1839. Defendants, by their answer, admitted the mortgage, but insisted it was usurious. A replication was filed to the answer, and testimony was taken by defendants to prove the usury. The chancellor was of opinion the usury was established by the proofs, and on 25th June, 1845, made a decree in favor of Shurts for the money actually loaned only, with interest. From this decree defendants appealed.

Gurney, for appellants.

Bacon, for appellee.

By the court, MILES, J. It is insisted by the appellants that the usury is proved, and that it is equitable that the appellee have a decree only for the amount of the mortgage, after deducting not only the amount of the usury, but also the penalty under R. S. 1838, p. 161, sec. 5, that being the law in force when the contract was made.

But before this bill was filed, that part of the statute imposing the penalty for taking usurious interest, was repealed, without reservation or saving clause. Sess. L. 1843, p. 54. In such case the penalty is gone.

1 Wash. C. C. Rep. 84; 1 Binney 601; 3 Burr. 1456; 1 Black. Rep. 451; 7 Wheaton 551.

The case of Aymer v. Gault, 2 Paige 284, referred to by appellants' counsel, was decided under the revised statutes of New York, containing the usual saving clause; as were also the cases in 4 Wendell 206, 210 and 211. The only questions that arose in those cases, under the statute, was as to the mode of proceeding, and that was expressly required to conform to the new statute.

The statute of 1843 before referred to, also repeals that part of the statute of 1838 by which the defendant was, in an action upon an usurious contract, entitled to recover costs, and confines the recovery of the plaintiff to the amount of the principal and legal interest: and as that appears to be the amount for which the decree was made in this case, we think it must be affirmed, with costs.

Decree affirmed.

CAMPAU v. FAIRBANKS.

The return to a summons in these words, "Served the within by reading personally,"—the statute requiring it to be served by reading it to defendent and delivering him a copy—is bad, and does not give the justice jurisdiction of the person of the defendant.

CERTIORARI. In August, 1837, Fairbanks sued Campau in a justice's court. The constable made the following return to the summons: "Served the within by reading personally;" to which he affixed the date of the service and subscribed his name. Campau did not appear on the return day, and Fairbanks proceeded *ex parte* before the justice and obtained a judgment, to reverse which Campau sued out a writ of certiorari from this court.

Tryon, for platntiff in error.

———, for defendant in error.

By the court, GREEN, J. The only ground of error assigned, is, that the service of the summons was insufficient, and that the justice did not, therefore, acquire jurisdiction of the defendant below, and that, consequently, the judgment is absolutely void.

The law in force at the time these proceedings were had before the justice (Laws of 1833, p. 194), required that the summons should be served by reading the same to the defendant, *and delivering a copy thereof to him*, if such defendant should be found; and that the sheriff or constable serving such summons should, upon the oath of his office, return thereupon the time and manner he executed the same; and that in case the defendant did not appear at the time and place mentioned in such summons, the said justice should then, or at such other reasonable time as he might appoint, proceed to hear and examine the proofs and allegations, and give judgment thereupon agreeably to law and evidence.

The service of the summons was clearly insufficient; and had the defendant appeared, he might have taken advantage of the irregularity, or might have waived it by pleading in bar, or taking some other step which pre-supposed a sufficient service. Did the defendant waive the irregularity by neglecting to appear and make the objection before the justice? The doctrine appears to be well settled, that a party who does not appear in a suit before a justice of the peace, waives nothing, but may raise the objection upon appeal or certiorari.

The return of the constable in this case being the only evidence of the time and manner of the service of the summons, upon which the justice could act, and that return not showing a service in accordance with the requisitions of the statute, the justice acquired no jurisdiction of the defendant, and, therefore, had no authority to render the judgment. 13 Wendell 85; 14 John. R. 481; 19 *id.* 39; 3 Wendell 202; 1 Doug. Mich. R. 384, 390.

The judgment of the court below must be reversed, with costs to the plaintiff in error.

Judgment reversed.

SMALLEY & NELDEN *v.* BRISTOL.

In declaring on a promissory note absolute on its face and in the ordinary form, it is not necessary to notice a contemporaneous agreement in writing varying the terms of the note, contained in a *separate paper.* Such agreement is matter of defence only.

CASE reserved from Oakland Circuit Court.

Barstow and Lockwood, for plaintiffs.

Hosmer, for defendant.

By the court, WING, J. The action in this case is assumpsit. The declaration contains a special count on a promissory note, and the common counts. Plea, the general issue. On the trial the plaintiffs produced the note declared on, which was in the usual form, executed by the defendant to the plaintiffs, payable one day after date, and proved the necessary facts to entitle them to recover on the same under the special or common counts, and then rested.

The defendant then introduced, or offered to introduce, in evidence a paper of which the following is a copy: "Recd., Pontiac, July 17, 1844, from Mr. Thomas W. Bristol, two notes, payable one day after date, for the sum of 231 83-100, to be paid on the following conditions, to wit: The said Thomas W. Bristol is security for Charles L. Bristol, in a suit brought by the Farmers' and Mechanics' Bank at Pontiac, which said suit is now pending undetermined in Oakland county. Now if said suit is decided against said Charles L. Bristol, and the said Thomas Bristol has to pay the said liability, then the above stated notes to be void. But if the suit is decided in favor of said Charles L. Bristol, then the said Thomas Bristol is to pay one of said notes immediately thereafter, and the other in one year from the date hereof. If the aforesaid notes are paid according to the above stipulation, then Smalley & Nelden agree to deduct from the note payable in one year, one hundred dollars, and the interest on the same. (Signed) SMALLEY & NELDEN."

The defendant contended that this paper writing, of itself, without any additional evidence of any kind, was a full defence to the action, on the ground that the paper writing was contemporaneous with the notes, and that it, together with the notes, constituted a mere common law contract, all of which, and the consideration thereof, should have been set forth in the declaration.

A verdict was taken for the plaintiffs, by consent of defendant and under the direction of the presiding judge, and the question of law presented by the defendant was reserved for the consideration of this court.

In support of his objection, the defendant's counsel cites Chitty on Bills, p. 160, in which it is stated that, "the rule that a bill or note payable on a contingency is invalid as such, extends also to cases where the bill or note is absolute on the face of it, but rendered contingent by a *contemporaneous* endorsement, or even by a written memorandum on a detached paper." The cases cited by Chitty in support of this position, are all cases in which the endorsement was on the back of the same note, and not on a detached paper, as in this case. It is not denied that an endorsement upon the back of the same note of a condition or contingency upon which the note is to be payable, will be considered as part and parcel of the note; but the authorities cited by Mr. Chitty do not establish the position stated by him. Indeed, it may be considered doubtful whether he intended to say that a contemporaneous writing on a detached paper would be considered as a part of the note—for in the next paragraph, which is under the head of "a separate memorandum," he says: "So, although the memorandum be on a *separate* paper, yet if it were contemporaneous, it is admissible between the original parties and their representatives: as where there was a written stipulation to renew on a separate paper, it was considered that it qualified the liability, although it did not vitiate the instrument itself." He cites Bowerbank v. Monteiro, 4 Taunt. 844. That was an action on a bill of exchange, and the plea was the general issue. The defendant introduced a writing signed by the plaintiff at the time the bill was accepted, but it was not set forth in the declaration—for it was questioned whether it ought not to have been plead specially. Nor was it objected that it was not set forth in the declaration, but the writing was held to be a defence to the note.

Defendant's counsel also cites the case of Carlos v. Fancourt, 5 T. R. 482. In this case the note was payable on a contingency expressed in the note, and it was held it was not a promissory note, and could not be declared upon as such; but must be declared upon as a special agreement. This case does not bear upon the case in hand, for it was not a case in which there was an absolute promise, which was modified by a separate, if not a subsequent, agreement. I do not find any references in Chitty on Bills which establish the position as a matter of pleading, that in a case like the present, the declaration should count upon a special agreement, and not upon the note as a negotiable instrument.

In Story on Promissory Notes, sec. 24, the Judge says: "In order to make a note invalid as a promissory note, the contingency to avoid it must be apparent, either upon the face of the note, or upon some contemporaneous written memorandum on the same paper; for, if the memorandum is not contemporaneous, or if it be merely verbal, in each case, whatever may be its effect as a matter of defence between the original parties, it is not deemed to be a part of the instrument, and does not affect, much less invalidate, its original character." Same doctrine in Bayley on Bills, 17.

In New York a contemporaneous written agreement endorsed upon the back of a promissory note, making its payment depend upon a contingency, does not affect its negotiability—its only effect is to give notice of the consideration to subsequent holders; and in a suit upon it, the maker may avail himself of any defence which he could set up against the payee. 15 Wendell 363. The New York courts acknowledge the English rule is different in cases of endorsement upon the note itself.

If these notes were negotiable promissory notes at the time they were delivered to the plaintiffs, and could be declared upon as such by subsequent parties as endorsers, may not the plaintiffs so declare upon them? In the cases cited by defendant's counsel, the decisions turned upon the ground that the notes were not negotiable promissory notes, being payable on a contingency, which was incorporated into the note by the endorsement being on the same instrument, and, of course, known to all; and plaintiff could not prove his note without also showing the endorsement, which showed it was not a negotiable note, because payable upon a contingency. The rights of the maker in this case, and which may be claimed to be a defence to these notes, are only known to the original parties. The receipt expresses a contingent defeasance, on the happening of which, the maker may use it as a defence against the payee; and in the mean time the receipt passes into the hands of the maker of the note, beyond the control of the payee, who cannot set it forth in his declaration, because he has it not, and most probably could not get it, after suit commenced, or for the purpose of commencing suit. He has promissory notes, which, so far as appears, are good as such. A separate writing, expressing that plaintiffs had received the notes, to be operative as such, on a contingency, or unless a certain event should happen, must be regarded as a contingent defeasance, of which the defendant may or may not avail himself, as the contingency may or may not happen. Where the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, then it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise form the subject of objection on the other side. Stephen's Pl. 396; Chitty's Pl. 228. Here the plaintiffs make out a good *prima facie* case and should recover, unless there is something shown extrinsic of the notes. The defence is matter which would come more properly from the other side—it is in his power. A plaintiff is never called upon to set forth more than his own case: he declares upon the contract of the defendant in his hands. The matters of defence set forth in the receipt, do not vitiate the promissory notes, but show, perhaps, that plaintiffs should not recover. There is no variance between plaintiffs' declaration and their proof.

Certified accordingly.

WILSON FOR THE USE OF FARRAND v. DAVIS.

Under the act, Sess. L. 1845, p. 98, a plaintiff against whom a judgment is rendered in a justice's court for costs only, amounting to less than $4, may appeal, and no affidavit under sec. 2 of the act is necessary to perfect the appeal in such case.

Where a statute provides that "if any party shall appeal" &c. from a judgment rendered by a justice, "such party, his agent or attorney," shall enter into a recognizance: *Held*, the appeal might be taken and the recogizance entered into by the person for whose use the suit was brought.

By the justices' act, Laws of 1833, p. 193, sec. 1, "judgment by confession may be entered by any justice of the peace for any sum not exceeding one hundred and fifty dollars, provided such confession be in writing, signed by the person making the same, in presence of the justice, or one or more competent witnesses." *Held*, a judgment on a confession not in writing, was void; and that where such judgment had been stayed, an action could not be sustained on the undertaking of the stay for the want of a consideration to support it.

Case reserved from Wayne Circuit Court. This was an action of assumpsit, brought by Rufus Wilson for the use of Jacob S. Farrand against Solomon Davis, upon the following instrument:

"Rufus Wilson
v.
Charles Davis. } State of Michigan, County of Wayne, *ss.*

"Whereas, judgment hath this day been rendered by John W. Strong, one of the justices of the peace in and for the county aforesaid, in favor of the plaintiff, against the defendant, for the sum of $50 damages, and 69 cents costs of suit, I do hereby acknowledge myself security for the stay of execution on said judgment, and agree to pay damages and costs, with interest on the same, in six months from this date.

"Dated Detroit, May 21st, 1838. (Signed) Solomon Davis."

The declaration contained the necessary allegation of the recovery by said Wilson of the judgment against Charles Davis, and the execution of the above stay of execution thereon by the defendant in this suit.

The defendant plead the general issue and other special pleas.

The cause was originally tried before a justice of the peace, who rendered a judgment against the plaintiff for the costs of suit, which were a sum less than $4.

From this judgment the plaintiff appealed to the circuit court. The statute under which the appeal was taken allows *any party* to a judgment to appeal, among other cases, "where final judgment was rendered upon an issue of fact joined between the parties." Sess. L. 1845, p. 98, sec. 1. And the second section of the same statute provides, that "no party against whom a judgment has been rendered by a justice of the peace upon any claim arising from contract, shall appeal therefrom to the circuit court, unless such party, his agent or attorney, shall, within five days after the rendition of such judgment, make and present to such justice an affidavit, alleging that the party recovering such judgment had recovered therein at least five dollars more than was justly and honestly due such party." The fourth section of the same act further provides, that "if any *party* shall appeal from a judgment rendered by a justice of the peace," &c., "such *party, his agent or attorney*, shall, within five days after the rendition of such judgment, enter into a recognizance, with at least one responsible surety, in a sum not less than double the amount of the judgment and costs, conditioned to prosecute such appeal with due diligence to judgment," &c. The appeal is this case was taken by Farrand, for whose use the action was brought, and the recognizance required by section four of the statute above quoted was entered into by him—Wilson, the nominal plaintiff, not joining therein; and no such affidavit as is required by section two of the same statute, was filed.

On the first day of the term of the circuit court, the defendant moved to dismiss the appeal, because: 1. It was not taken, nor was the recognizance entered into by a party to the judgment. 2. The affidavit required by section two of the statute above quoted, had not been filed. 3. Appeal did not lie in such a case, under the statute, which motion was overruled by the court.

The cause subsequently proceeded to trial before a jury. On the trial the plaintiff read in evidence, to prove the judgment referred to in the instrument on which his action was founded, the following entry, under date of May 21, 1838, from the docket of Justice Strong:

"Rufus Wilson
v.
Charles Davis. } *Amicable suit. Assumpsit*, $50.

"Defendant in court and confesses judgment in favor of the plaintiff in the sum of $50 damages, and 56 cents costs of suit, for which several sums judgment is hereby rendered. Stay entered by Solomon Davis.

Damages - - - - - - - -	$50 00
Costs - - - - - - - - - -	56
	$50 56"

No written confession signed by Charles Davis was proved by the plaintiff; and it appeared in evidence on the defence, that none was executed.

The first section of the justices' act of 1833, from which the jurisdiction of the justice was derived, provides, that "all actions of assumpsit, &c., where the balance due, or the damages or thing demanded shall not exceed $100, &c., shall be cognizable before any justice of the peace; and judgment by confession may be entered by any justice of the peace for any sum not exceeding $150, provided that such confession shall be *in writing, signed by the person making the same, in the presence of the justice, or one or more competent witnesses.*"

It was insisted on the part of the defendant, that under this statute, the judgment was void for want of jurisdiction.

After the evidence was closed the cause was, with the consent of the court, withdrawn from the jury, and a case was agreed upon between the parties, which was reserved by the presiding judge for the opinion of this court upon the questions arising thereon, and among which were:

1. Whether the motion to dismiss the appeal was properly denied.
2. Whether the justice of the peace had jurisdiction to render the judgment in favor of Wilson against Charles Davis, and the same was valid and would support the defendant's undertaking.

E. C. Walker, for plaintiff.

Van Dyke and Emmons, for defendant.

By the court, WING, J. It is objected that the statute did not authorize an appeal in this case, because an affidavit was not made. It has been repeatedly decided in this court that an appeal did lie in a case like this, without an affidavit by the party appealing, as the case is embraced by the first section of the justices' act of 1845 (Sess. L. 1845, p. 98); and the cases in which affidavits are required are specially specified, and this is not one of them. As this question has been put at rest by the amendatory act of 1846 (Sess. L. 1846, p. 235), it cannot now be a matter of any particular importance that the reasons which have influenced the court in adopting this construction of the statute, should be published.

It is further objected that Farrand, the assignee of the original judgment, claimed the appeal from the decision of the justice and entered into a recognizance, instead of Wilson, the plaintiff in the suit. The fourth section of the act provides, that "if any party shall appeal from a judgment rendered by a justice of the peace, as herein before provided, such party, his agent or attorney, shall, within five days, enter into a recognizance," &c. We think that Farrand must be considered to be the agent and attorney for the nominal plaintiff. He is the assignee of the judgment; the plaintiff has authorized him, by the sale to him, to prosecute the suit, and to do all matters necessary to make it available to him, at the least, if the plaintiff does not interfere. The assignment of the judgment operates as a power of attorney, irrevocable to the assignee, to prosecute and collect the judgment in the name of the assignor, the plaintiff in the judgment.

The only other point made in the case which we deem it necessary to notice, is, that the original judgment was void, and did not, and could not form a sufficient consideration for the alleged assumption of the defendant.

The questions raised by this objection upon the first section of the justices' act of 1833, have been repeatedly considered and decided by this court. The reasons urged in support of this objection are, that the statute required, that to give jurisdiction to the justice, the confession should have been made "in writing, signed by the person making the same, in the presence of the justice, or one or more competent witnesses;" and the judgment was rendered by the justice without his having any written confession of judgment.

It is urged by plaintiff's counsel, that certain authorities cited by him, having a strong bearing upon this question, have not hitherto been considered by the court in making up their decisions upon this question.

It has been uniformly held by this court, that to give validity to a judgment by confession, the justice, in rendering the same, must strictly pursue the authority given to him by the statute; and that the facts necessary to give him jurisdiction must affirmatively appear in his proceedings, and cannot be presumed. Wright *v.* Warner, 1 Doug. Mich. R. 384; Clark *v.* Holmes, *id.* 390. In the case of Beach *v.* Botsford, *id.* 199, the confession was written and signed by the defendant, but it was not witnessed: and it was decided that the confession was not made in conformity to the requirements of the statutes, and, therefore, did not give the justice jurisdiction of the defendant. In the case of Spears *v.* Carter, *ante* 19, the record of the justice stated, that the "judgment was rendered upon the written confession of defendant, in favor of the plaintiff;" but no such written confesssion was shown to have been made. The judgment was held to be void, for two reasons: 1. That it did not appear that the justice acquired jurisdiction of the defendant, or of the subject matter of the suit. 2. The cause of action was not stated in the judgment. In this cause, it does not appear from the record or the files of the justice, whether it was for damages for slander, false imprisonment, or any other cause of action of which the justice had not jurisdiction; there is no reference to any note or contract in the judgment. There is no pretence that a written confession was ever made. In the cases cited it was decided there must be a written confession, in the presence of the justice, or one or more competent witnesses, and that such confession must be presented to the justice before he could acquire jurisdiction of the party.

Plaintiff's counsel insists that Justice Strong had jurisdiction of the amount, of the persons and the place—that when the parties appeared before him, and had stated their case, and he put pen to his docket, at that moment he was in possession of the case, with full power to carry it on to a close; and if the justice erred in any of the subsequent steps in taking the confession, it did not oust him of his jurisdiction—that the proviso only regulates the mode of exercising jurisdiction.

The same section of the act specifies the actions and amounts of which justices shall have jurisdiction. The mode in which this jurisdiction is to be exercised in cases of confession, is prescribed in this section; the other sections of the act prescribe the mode of its exercise in other cases. The appearance of a defendant may be enforced by process, or he may voluntarily appear, and in the latter case an amicable suit may be entered; but this supposes a denial by the defendant of the cause of action—otherwise there is nothing to try. In the caption of the judgment the justice has written "*Amicable suit;*" but it was not such a suit: it purported to be, as appeared from the recital in the judgment, a confession of judgment. That part of the section which authorizes the justice to enter judgment upon confession, provides, that "judgments by confession may be entered by any justice of the peace for any sum not exceeding $150, provided such confession be in writing, signed by the person making the same, in the presence of the justice, or one or more competent witnesses." Until there has been a literal compliance with this provision of law, the justice cannot have jurisdiction of a defendant. The cases cited by the plaintiff in support of his position, are, 2 Salkeld 674; 17 John. R. 145; 2 Cowen 548; and 4 John. C. R. 91. In these cases the jurisdiction of the court or officers to render judgment or make orders, was denied. It was urged that because their proceedings were defective in some respects, they were void; but the court held, that because the tribunals in the exercise of conceded powers had erred, their acts were voidable, only—not absolutely void. In the last case cited, the chancellor, whilst he does not admit that the proceedings which were objected to as void, were shown to be so, says, that the complainant is estopped from questioning them, as he, by his acts and acquiescence, has led the defendant to expend large sums of money upon the lands purchased by virtue of those proceedings.

We cannot perceive any good reason for overruling the decisions heretofore made by this court upon this point, and we think the judgment read in evidence in this case was void, and, therefore, cannot furnish a valid consideration for the promise of the defendant set forth in plaintiff's declaration.

Certified accordingly.

CASES
DETERMINED IN THE SUPREME COURT
OF THE
STATE OF MICHIGAN,

AT KALAMAZOO.

MAY TERM, 1848.

PRESENT:

HON. CHARLES W. WHIPPLE, C. J.
HON. WARNER WING, } Justices.
HON. GEORGE MILES, } Justices.
HON. SANFORD M. GREEN, } Justices.
HON. EDWARD MUNDY,* } Justices.

Hinkey *v.* Cade.

A writ of error does not lie from this court to a county court in civil cases.

Error to St. Joseph County Court.

Hammond, for plaintiff in error.

Pease, for defendant in error.

By the court, Whipple, C. J. This cause originated before a justice of the peace, and after judgment was appealed to the county court of the county of St. Joseph. Judgment having been rendered in the county court against the plaintiff in error, he sued out a writ of error, to remove the record and proceedings from the county court, to this court for review.

The errors assigned upon the record are of such a character as to warrant the reversal of the judgment below if we have jurisdiction of the cause.

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* By an act of the Legislature of 3d April, 1848, the Supreme Court was made to consist of five judges, and the Hon. Edward Mundy on the same day was appointed Associate Justice of the court.

The preliminary question will be first examined. The general jurisdiction and powers of this court are defined by the second and third sections of chapter 88 of the revision of 1846. The second section provides, that the supreme court shall have original and appellate jurisdiction of all such matters and suits at law and in equity, as may be lawfully brought before it; and shall also have jurisdiction of suits, actions and matters brought before it by writ of certiorari or writ of error, when the same shall be allowed by law, to any inferior court, to magistrates or other officers, as well in cases of prosecution for any offence, misdemeanor or penalty, in the name of the people of this state, as in other cases; and shall have authority to issue writs of error, prohibition, certiorari, mandamus, quo warranto, habeas corpus, procedendo, supersedeas, and all other process that may be necessary for the due execution of the law, and the administration of justice, and the full and perfect exercise of its jurisdiction, and to hear and determine them, according to the principles and usages of law and equity. The third section provides, that "The supreme court shall have the general supervision of all courts of law of inferior jurisdiction, to prevent and correct errors and abuses therein when no other remedy is expressly provided by law." These sections confer upon the supreme court the most ample powers to issue the great remedial writs therein specified, and to review the proceedings in, and control the actions of all inferior jurisdictions. They will justify the issuing of the writ of error in this case, unless subsequent legislation has provided another tribunal, where judgments in the county courts are to be reviewed before they can properly come under the cognizance of this court.

The forty-fifth section of chapter 92 of the new revision, provides as follows: "No appeal shall be made or allowed of any case tried or determined by a county court; but in all cases of judgments rendered in such courts, either party thinking himself aggrieved or injured by such judgment, may remove the same by certiorari into the circuit court for the same county in which such judgment was rendered."

This section, it is true, does not in terms conflict with the provisions authorizing this court to issue writs of error to review the judgment of inferior courts; but still it makes a specific provision as to how judgments in the county courts are to be reviewed. It makes the circuit court the tribunal by which errors in the county courts are to be corrected.

From a judgment of the *circuit court* the appellate jurisdiction of this court may be successfully invoked. The apparent conflict in the provisions of our statute establishing our courts and defining their jurisdiction and powers, has resulted from the circumstance that a part of these provisions was the work of the revisor, and the remaining portion that of the legislature; the consequence has been that our whole judicial system has become so complex, and the laws establishing the system are so inartificially drawn, as to produce almost inextricable confusion. One leading idea, however, pervaded the minds of those who erected the system; that idea was, that, as far as practicable, tribunals of original and appellate jurisdiction in matters of law, and of original jurisdiction in equity, should be established in each county. Keeping this in mind, and surveying our whole judicial establishment, as it lies scattered through the revision, and the legislation of the last two winters, and I think it manifest that all judgments rendered in the county courts in civil causes must first pass the ordeal of the circuit, before they can be reviewed by this court.

The writ of error having issued improvidently, we have no jurisdiction of the case, and cannot, therefore, apply a corrective to the errors which pervade the record below.

Cause dismissed.

LOOMIS v. FOSTER.

The general issue, *not guilty*, in replevin under R. S. 1838, p. 523, as amended by Sess. L. 1839, p. 230, sec. 44, puts in issue every fact stated in the declaration necessary to sustain plaintiff's action, and not the detention of the property only.

ERROR to Allegan Circuit Court. Replevin under R. S. 1838. The declaration averred a wrongful and unlawful detention by Loomis of a grey horse belonging to Foster. Plea, not guilty. On the trial, Foster proved that on 30th April, 1844, before suit was brought, he demanded the horse of Loomis, who refused to give him up, stating he owned the horse himself. Foster then proved his damages by reason of the detention, and rested. Thereupon Loomis offered to prove the horse belonged to him; but the court rejected the evidence, on the ground that by his plea of not guilty he admitted the property and the right of possession to be in Foster, and that the detention only was put in issue. Loomis excepted to the opinion of the court. He then requested the court to charge the jury that Foster, to recover, must prove property in the horse, in addition to the detention of the horse by defendant. This the court refused, and, in charging the jury, stated it was not necessary Foster should show either a right of property in the horse, or a right to the possession.

Moore, for plaintiff in error.

H. K. Clark, for defendant in error.

By the court, WING, J. It is urged in support of the decision of the circuit judge, that there were two material allegations in the declaration, one or both of which defendant might have traversed, as the nature of his defence required, viz:

1. The right of possession of the plaintiff.
2. The detention of the property.

It is urged that the session law of 1839, p. 230, sec. 44, which prescribes the form of the general issue in replevin, has in no respect changed the nature or effect of the general issue in this action at common law, which was *non cepit*, and which only denied the taking, but admitted the right of property to be in the plaintiff; and, if this is not correct by analogy in an action of replevin under the statute for a detention, not guilty only denied the detention, and admitted the property to be in the plaintiff, as alleged.

In this case the only cause of action stated, is, the wilful and unlawful detention of the horse. If it is true that the plea of not guilty only denied the taking, it would have no relation to the subject matter of complaint alleged in the declaration: for it would only deny what is not asserted. It is manifest, then, that as this plea is given by the statute as an appropriate plea in an action of replevin, whether the action be for a wrongful taking or detention, and in cases where both are combined in the same action, some meaning and effect must be given to the plea in an action for a detention only. If it means anything by way of defence to the averments in the declaration, how can we restrict it to some one averment, and hold it to be an admission of the others? If it can be maintained that in an action for taking and detaining, this plea amounts to the common law plea of *non cepit*, and admits the property to be in the plaintiff, it must also admit the wrongful detention: for it does not reach the charge of detention.

The question, then, is, what effect shall be given to the plea of not guilty in an action of replevin for an unlawful and wrongful detention? The statute of 1839 provides, that "the general issue shall be joined on the plea of not guilty."

In the largest class of actions, where there is strictly and technically a general issue, a plea of the general issue traverses, thwarts and denies at once the whole declaration, without offering any special matter to evade it. 3 Black. Com. 305. In some actions, some pleas are called the general issue which, strictly speaking, are not so, as *nul tiel record* in debt, and *non est factum* in covenant. But the books treat these pleas as being something short of the general issue in its broadest sense. So in replevin at common law it is said *non cepit* is called the general issue; but it is so in a restricted sense only, since it does not embrace and deny all the allegations in the declaration, but takes issue upon a single point, and, like special pleas, admits what it does not deny. It is more like a special plea than the general issue. At common law an action of replevin would only lie in cases of a wrongful taking, and where trespass would lie. A denial of the taking was the most common defence, and if proved it disposed of the action; the gist of the action was the wrongful taking. In bringing replevin, the plaintiff narrowed his grounds of complaint to the loss *resulting* from the taking; he did not embrace in his action, as he would in an action of trespass, the injury accompanying the taking; and the defendant, by the plea of *non cepit*, still further narrowed the issue to the simple act of taking. The plea of *non cepit* did not embrace all that was embraced in an action of trespass by the plea of not guilty. In the one case, the plea denied a specific single fact charged; in the other, every allegation in the declaration was put in issue.

At common law, if a plaintiff sought to recover the specific property detained, he was obliged to bring detinue. If he only sought damages for the detention, he brought an action of trover. Our revised statutes have, in some measure, incorporated both these remedies in the action of replevin; and, if we are to be governed by the analogies of the common law, we may say that the general issue joined by the plea of not guilty is the same as in the actions of detinue or trover; in the first of which the plea of non detinet, and in the latter the plea of not guilty, puts the plaintiff to the proof of all the substantial allegations in his declaration. The statute treats the act of unlawful and wilful detention as a tortious act, a wrong and injury; and replevin for a wrongful detention appears to have been considered as analogous to an action of trover, since the plea applicable to such an action is given.

If it was the object of the legislature to give a new and arbitrary name to the plea of *non cepit* without changing its nature, why did they not adopt the plain English of the general issue, and say a denial of the taking should be the general issue? As they have given in an action for a detention a plea which is the general issue in trover, why should we not give to the plea its appropriate scope and effect—the same meaning that is given to it in actions where the plea is allowed?

It is urged that as *non cepit* is called the general issue in replevin at common law for a wrongful taking, *non detinet* should be the general issue in an action of replevin for a wronful detention only. But as there was no such action at common law, no such plea could be pleaded to it: and, consequently, it cannot be supposed to have been intended by the legislature. Justice Nelson, in 12 Wendell 33, says, that the distinction made between the effect and operation of the general issue in the cases of *non cepit* and *non detinet* is in analogy to that existing in the action of trespass and trover. In the first the defendant cannot, under the plea of not guilty, show property out of the plaintiff; but he may in the latter. The action of trespass is founded on the right of the plaintiff to the possession; trover is founded on the right of property, and this is the reason of the distinction.

We have, as we think, already shown that the plea of the general issue in this case could not mean the general issue of *non cepit;* no special or definite plea was pointed to as the general issue by saying the general issue should be joined by the plea of not guilty. We think the intention of the legislature was, that the plea of not guilty in this action should have the force and effect given to the general issue in its broadest sense, as stated by Blackstone; and not that the plea of not guilty should have only the effect of a denial that the defendant detains the property—admitting the property and right of possession of plaintiff. If this is not so, the statute would be calculated to mystify and entangle litigants, and could subserve no beneficial purpose.

Judgment reversed.

CASES
DETERMINED IN THE SUPREME COURT
OF THE
STATE OF MICHIGAN,
AT DETROIT.

JANUARY TERM, 1849.

PRESENT:

HON. CHARLES W. WHIPPLE, C. J.
HON. WARNER WING,
HON. GEORGE MILES,
HON. SANFORD M. GREEN,
HON. EDWARD MUNDY, } JUSTICES.

ROBINSON *v.* STEAM BOAT RED JACKET.

The act to provide for the collection of demands against boats and vessels, Ses. L. 1839, p. 70, gave a new and cumulative remedy, but did not give a lien on the vessel itself until taken on the attachment; and the remedy given by that act was not reserved by sec. 2, ch. 173, R. S., (which chapter repealed the act,) to a party whose proceedings were not instituted under the act before its repeal—such remedy not being a *right accrued* within the meaning of these words as used in that section.

CASE reserved from Wayne Circuit Court. Proceedings by attachment, under the act to provide for the collection of demands against boats and vessels, approved April 10th, 1839, Ses. L. 1839, p. 70. The complaint was filed on 26th October, 1847, and charged the injury to have been committed on the 13th November, 1846. The act under which the proceedings were instituted, was repealed by ch. 173, R. S., which took effect 1st March, 1847. The defendant demurred, and the questions raised by the pleadings were reserved by the circuit court for the opinion of this court.

Fraser and Romeyn, for plaintiff.

Van Dyke and Emmons, for defendant.

By the court, WHIPPLE, C. J. On the 26th October, 1847, the complainant filed his complaint under the fourth subdivision of section 1 of the act entitled "An act to provide for the collection of demands against boats and vessels," Ses. L. 1839, p. 70.

That section, among other things, provides, "that every boat or vessel used in navigating the waters of this state, shall be liable for all injuries done to persons or property by such boat or vessel, in all instances where the same is shown to have occurred through the negligence or misconduct of the master or hands thereon employed." The second section provides, that any person having a demand arising under the provisions of the first section, instead of proceeding for the recovery thereof against the master, owner or consignee of a boat or vessel, may, at his option, institute suit against such boat or vessel by name. The third section provides, that the complaint shall be filed with the clerk of the circuit court of the county in which such boat or vessel may be found. The fourth section requires, that the complaint should state the particulars of the plaintiff's demand, and that it should be verified by affidavit. The 5th section provides, that upon filing the complaint, the clerk shall issue a writ of attachment directing the sheriff to seize the boat or vessel, and detain the same in his custody until discharged by due course of law. The sixth section directs, that subsequent proceedings shall be had in the manner, as near as may be, as if suit had been instituted by summons against the person, &c.

The remedy provided by the act is merely cumulative; that furnished by the common law proved ineffectual in many instances, from the difficulty of discovering or reaching those upon whom the law imposes a liability for the causes specified in the act. This, with other reasons, suggested a new and more efficient remedy by which rights could be successfully enforced. No *specific lien* is created by the statute until the attachment is actually served. The first section, it is true, declares the boat or vessel liable in certain cases; but this section, when construed with reference to other sections of the same law, shows how this liability is to be enforced. The remedy which the statute provides would have been quite as effectual if the words which declare boats and vessels *liable* had been omitted. It it said, in the case of the Steam Boat Monarch v. Finley, 10 Ohio 384, that "this law gives a lien upon such crafts for certain claims against them." As this question did not necessarily arise in that case, the decision of the supreme court of Ohio is not entitled to that respect which we should have felt bound to give to it had the question been directly presented for its determination. Assuming, however, that the decision was deliberately made, it detracts much from its weight that the same court should have subsequently declared that the liability of the boat or vessel "is not in the nature of a lien." The Huron v. Simmons, 11 Ohio 458. And in a case in 14 Ohio 72, the court affirm that a lien, in a technical sense, is not created, but that "it is something which appropriates the property as effectually, if not more so, than ordinary liens." The adjudications in Ohio do not appear to be consistent on the question as to whether, upon the accruing of a cause of action contemplated by the first section of our act, a lien at once attaches. These cases do not profess to discuss the question; and no decision which can be regarded as authoritative and binding upon the courts of that state, is to be found until the judgment of the supreme court was pronounced in the case of Jones & Watkins v. The Steam Boat Commerce, 14 Ohio 408. This case determines, "that the first section of the act does not create a lien. It merely declares a liability, leaving the mode of enforcing it to the provisions made in the four next succeeding sections." These views are in precise accordance with those expressed by this court at the January term, 1842, in the case of Moses v. The Steam Boat Missouri.* We have examined the opinion in that case, and see no reason why it should not be deemed a sound and correct exposition of the statute. We, therefore, take occasion now to re-affirm the doctrines of that case.

The learned counsel for the plaintiff was not advised, until the argument of the case, that a construction had been given to the statute in question by this court—the opinion never having been published. Had the fact of its promulgation been known, it must have narrowed a discussion which assumed a wider range in consequence of the prominence given to a question which it was supposed had not been judicially determined. If a lien was, in point of law, created at the time the cause of action is alleged to have accrued, the argument of counsel, and the authorities cited in their support, would have demanded the greatest attention, and would, perhaps, have authorized us to sustain the complaint on the ground that a right had accrued within the meaning of the saving clause of the general repealing statute of 1846. As a lien did not attach, we are now to consider whether the complaint can be sustained upon other grounds.

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*For this case see Appendix.

The act of 1839 is repealed by chapter 173 of the revision of 1846; but it is declared that such repeal "shall not affect any act done, or right accrued or established, or any proceeding, suit or prosecution had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provision so repealed had remained in force."

It is contended that *a right having accrued* to the plaintiff, the proceedings were properly instituted under the act of 1839. The complaint was filed on the 26th October, 1847; the injury complained of, and which constitutes the cause of action, is alleged to have occurred on the 13th November, 1846. The repealing statute was approved May 18, 1846, and took effect March 1, 1847. The cause of action, then accrued while the act of 1839 was in force; the complaint, however, was not filed until after that act was repealed, although more than three months intervened between the time when the cause of action accrued and the repeal of the act of 1839.

I have said, that the act of 1839 gave a new and cumulative remedy in certain cases therein specified. Instead of confining the party injured by the collision complained of, to the common law remedy by action on the case, it authorized a proceeding, differing in point of form, though intended to accomplish the same object—redress the injury. The *essential* difference between the two modes of proceeding consists in this, that after service of the attachment a specific lien is acquired, and the boat is liable to be sold to satisfy any judgment that may be rendered in favor of the plaintiff; while by the old remedy, no such lien could be acquired until *after* judgment and levy of execution. The practical questions, then, to be determined, are: whether the right to institute proceedings under the act of 1839, notwithstanding its repeal, is saved by the second section of chapter 173 of the revision of 1846; and if not thus saved, whether the repeal of the act is not inoperative and void, so far as it purports to deprive the plaintiff of the remedy the act of 1839 provides for enforcing claims arising under it.

The consideration of these questions involves the distinction so often referred to in adjudged cases, between the right and the remedy. So close is the connection between what is denominated the *right* and what the *remedy*, that it is often difficult to draw the line which divides the one from the other. No right can, in *legal contemplation*, be said to exist, unless there be a remedy by which it may be enforced. Do the words "*right accrued*," secure to the plaintiff the right to proceed under the act of 1839, to enforce a cause of action accruing while that act was in force? That the legislature did not so intend, is, I think, very clear, whether we consider the import of those words in connection with, or disconnected from other words in the same section.

We have said that the act of 1839 gave a new remedy for the wrong of which the plaintiff complains; he might, however, waive his right to proceed under that act, and avail himself of the old remedy. But it has been determined that under the act of 1839, no lien was created until the actual service of the attachment; how, then, can it be said that a "*right accrued*," when the plaintiff did not institute proceedings until the act was repealed. Had the complaint been filed and the attachment served before the repeal, the specific lien which would have been thus acquired would, perhaps, have been such a *right* as the statute intended to preserve. It will not and cannot be contended that those words are so comprehensive as to embrace the right to sue in a particular form. If the mode of proceeding given by the act of 1839, excluded every other remedy for a redress of the injury, and that act had been repealed without securing to the plaintiff a reasonable remedy for a pre-existing right of action, then, perhaps, the arguments of counsel might hold good: for the *right of action* which had *accrued* being saved, would, by fair implication, include the *remedy*, without which the *right* saved could not be saved. In other words, we would not attribute to the legislature the folly of saving a *right*, and at the same instant of extinguishing the only *remedy* by which it could be enforced. But the legislature allowed the plaintiff more than three months after the act passed and before it took effect, to avail himself of the particular remedy which that act gave—after which he was remitted to the remedy secured to him by the common law. But the construction for which I contend is supported by the context. It is declared by the second section, that the repeal should not affect "any proceeding, suit, or prosecution had or commenced in any civil case, previous to the time when such repeal shall take effect;" and the fourth section saves all prosecutions for offences committed, and for the recovery of forfeitures and penalties. Why should these provisions have been deemed necessary, if the same object had been attained by the general saving clause so strongly relied on by the counsel for the plaintiff? If it did not embrace the class of cases specially enumerated, how can it be argued that it embraces suits not pending at the date of the repeal? The saving clauses contained in our general repealing statute were borrowed from New York, and the words "right accrued or established," have received a judicial construction in the courts of that state. In the case of The People *v.* Livingston, 6 Wendell 526, Mr. Justice Savage, in commenting upon the saving clause of the second section of our general repealing act, uses this language: "It cannot be denied that the legislature possesses the power to take away by statute what was given by statute, except vested rights. As it is undoubtedly competent for the legislature to repeal absolutely, so it is competent, notwithstanding the repeal, to continue the old law in force as to the proceedings commenced under it, to substitute another law in place of the old one, and to direct that all future proceedings in the progress of a cause or the prosecution of a right, shall be governed by such new law." And again: "It seems to me to have been the intention of the legislature *to confirm all rights which had accrued*—to be enforced, however, according to the new remedy." These views were recognized and adopted in subsequent adjudications in that state. In the case of Bickford *v.* Boston and Lowell R. R. Co., 21 Pick. 109, the construction of the saving clauses in the Massachusetts Revised Statutes was called in question. In delivering the opinion of the court, Ch. J. Shaw declared, that "the purpose of the statute was to confirm existing rights." These cases I will not analyze: but they all show very conclusively that the *rights* contemplated by the statute were such as were fixed and established, and not merely incohate and contingent. It is admitted that the grant or confirmation of a right will unquestionably carry with it, as an incident, the means necessary to its enjoyment. If, then, the object and intent of the provision which continues in force rights accrued or established, could not be carried into effect without preserving the old remedy, we would so construe the provision as to preserve that remedy.

In the case before us the right of action was preserved, notwithstanding the repeal of the act of 1839. The remedy by attachment, however, was repealed, and the plaintiff was necessarily remitted to that provided by the common law. The question as to whether it would prove as efficient or convenient, it is not necessary to consider.

If, then, the remedy provided by the act of 1839 for redressing the wrong of which the plaintiff complains, was not preserved by the saving clause of the general repealing statute, I am at a loss to determine how the plaintiff can avail himself of the remedy, upon any reasoning to be deduced from the constitution, or from any principle of general jurisprudence with which I am familiar. The arguments of counsel, and the array of authorities by which those arguments were fortified, were and must have been founded on the idea *that the act of 1839 created a lien.* But I have endeavored to show *that no lien attached* until a complaint was filed and an attachment actually levied. If so, those arguments, forcible as they might have been when applied to a state of facts like those assumed by counsel, can have no force, and the authorities cited no pertinency, when applied to a state of facts so essentially different from those assumed. The repeal of the act of 1839 violated no *vested* right, unless it can be maintained that the plaintiff had a right to the particular remedy which that act provided for the several causes of action specified in the first section. To maintain such a proposition, would be pushing the doctrine of vested rights further than it has been carried by any adjudication which has been or can be cited.

The power of the legislature to repeal existing remedies is unquestioned, unless such repeal violate rights protected by the constitution. If the effect of a repeal or modification of an existing remedy be to impair the obligation of a contract, it would be declared void, although it did not profess to act directly upon the contract. There are cases which would seem to imply that the federal and state constitutions do not contain the only limitations upon legislative power, and that acts which do not violate either may, nevertheless, be declared inoperative. I will not stop to discuss such a proposition, because it does not arise in the case before us. It may, however, be asserted that courts would find some difficulty in declaring any act of the legislature void, upon any general notion that it violated a great principle of right or of general jurisprudence. Courts have said and might again say, that they will not so construe an act of the legislature as that it shall work injustice, or impair vested rights; they will not intend that the legislature meant, under the forms of law, to do that which is repugnant to reason or justice. But I know of no limitations upon the legislative authority but such as are prescribed by the constitution. The judiciary are armed with all the power necessary to protect the citizen in his rights, without resorting to any of the doubtful powers which have existed in the imaginations of judges, but which have no real foundation in fact.

In the case before us, the plaintiff brings an action for a *tort;* the form of remedy he has adopted would have been justified had the act of 1839 not been repealed by the revised statutes of 1846; as it was repealed, and there is no provision in the repealing clause saving to the plaintiff the particular form of remedy prescribed by the act of 1839, although the cause of action accrued while that act was in force, it follows that the demurrer must be sustained.

Certified accordingly.

ABBOTT ET AL. v. GODFROY'S HEIRS.

In foreclosing a mortgage against the heirs of a deceased mortgagor, the personal representative of the deceased is not a necessary party, unless the personal estate is sought to be charged with a deficiency in the mortgaged premises to pay the debt.

An agreement in writing, intended by the parties to give a lien on real estate for the payment of a debt, though not witnessed as required by statute, to convey real estate, is good as an equitable mortgage.

The territory comprising the present state of Michigan remained under the control and jurisdiction of the British government until the year 1796; and the Ordinance of 1787, though made before that year, was not in force while the territory was under such jurisdiction.

Where the bill charges an instrument to be a mortgage, asks to have it foreclosed as such, and contains a prayer for other or further relief, the court may declare it to be a mortgage, although there be no special prayer for that purpose in the bill.

Lapse of time, in connection with non payment of interest and continued possession of the mortgagor, unaccompanied by any effort on the part of the mortgagee to enforce payment, is not a legal but an equitable or presumptive bar, and the presumption may be rebutted by circumstances. What circumstances will rebut the presumption, must depend upon the facts in each particular case.

In cases of presumptive bar from lapse of time, the rule as to subsequent disabilities is different from that of the statute of limitations. Under the statute, the party must bring himself within the exceptions of the statute; whereas, in cases of presumptive bar, he may show any circumstance that outweighs the presumption.

On June 18, 1789, the ancestor of the defendants gave a mortgage, payable on 28th August, 1790. The mortgagee died in 1790, but administration on his estate was not granted until 1835, and the year following a bill was filed to foreclose the mortgage. *Held*, the presumption of payment arising from lapse of time was overthrown by the fact that there was no one, from the death of the mortgagee, in 1790, until administration was granted in 1835, who could receive payment of the money and discharge the mortgage.

Appeal from the Court of Chancery. A bill was filed in that court by complainants in January, 1836, to foreclose an alleged hypotheque or French mortgage given by G. Godfroy, the defendants' ancestor, on the 18th June, 1789, to one Duperon Baby, to secure the payment of £396 0s. 3d., New York currency, on the 28th August, 1790. The bill stated the making of the instrument before a notary public, and that without any acknowledgment it was recorded in the county of Wayne in the year 1798; the death of Duperon Baby in the year 1790, and that no proceedings to take out administration on his estate were had until 1835, when administration, on the 12th September of that year was granted to Jean B. Baby, who on the 30th of the same month assigned the instrument to complainants. It further stated that the money mentioned in the instrument was unpaid, principal and interest; that G. Godfroy died in the year 1833, and that he frequently recognized the existence and legal validity of the instrument.

The court below dismissed the bill on the ground of the staleness of the demand, and that complainants had failed to establish and prove any facts or circumstances to take the case out of the opeartion of the general rule of presumption of payment from lapse of time. From this decree the complainants appealed to this court. The case made by the pleadings and evidence is fully stated in the opinion of the court.

Fraser & Davidson, for appellants.

Backus & Sibley, for appellees.

By the Court, MILES, J. On the 18th day of June, 1789, Gabriel Godfroy executed an instrument in writing, before a notary public and in the presence of a subscribing witness, by which he acknowledged himself to be justly indebted to one Duperon Baby in the sum of £396 0s. 3d., for value received from him, and which he promised to pay to him on the 28th day of August, 1790, with interest at six per cent. And in order to secure the payment of this sum, Godfroy by the same instrument assigned and mortgaged a farm in the township of Springwells, on which he then resided, and declared that the same should remain mortgaged to Baby, his heirs and assigns, as a security for that sum and interest until payment in full should be effected.

Duperon Baby died in 1790; and in 1835, in virtue of a special act of the legislature of this state, administration of his estate was granted to Jean Baptiste Baby his son, who on the 13th day of September of that year assigned this instrument to the complainants, and on the 27th day of January, 1836, they filed a bill in chancery to foreclose it as a mortgage.

Gabriel Godfroy died in 1833, and his administrators were, with his heirs, made parties, defendants to the bill; but after answer put in by one of the administrators, the bill was voluntarily dismissed as to them.

The remaining defendants now insist that the administrators are necessary parties; and the complainants having dismissed their bill as to them, cannot have a decree.

In England, except in cases where, on account of the insufficiency of the security in the mortgage, the bill prays an account of personal property as well as a sale of the land, the personal representative is held not to be a necessary party; and in such case, not on account of a prayer for a sale of the land, but because the party, in addition to the land, seeks to approprtate the personal assets to the payment of the debt.

The bill being only to foreclose the equity of redemption, the heir having the equity is the only necessary party. Edw. on Parties, p. 91, sec. 41, and the cases there referred to. 1 Smith's Ch. Pr. 541.

Though the result of a proceeding in chancery in England to enforce the lien is generally a strict foreclosure, and although we in practice substitute a sale, yet the difference in the result does not change the character of the proceeding, which in both cases has in view the satisfaction of the debt.

If this bill sought to appropriate the personal assets of the estate to that object, the administrators, as representiug those assets, would be a necessary party, having an interest. 4 Blackf. R. 381. This case having been decided under a statute similar to our own, is in point. It was held, the administrator was an improper party to a bill of foreclosure.

The provision of our statute, making real estate assets for the payment of debts, gives no preference over specific liens before created on the land.

Mr. Edwards, in his treatise on Parties in Chancery, before referred to, says, "in New York some practitioners make the executors parties, and join the heir with them, but this is incorrect; the heir is the only necessary party:" p. 91, sec. 41.

It is next objected, that this instrument is not a mortgage at common law, and that it was made after the Ordinance of 1787 was in force in this territory; and that, since that time, lands in Michigan could only be sold or encumbered by a deed, signed, sealed and attested by two witnesses. Ordinance of 1787, sec. 2. If this is a good equitable mortgage, that is an answer to at least the first of these objections; and as to the latter, it may be replied, as a matter of history, that the territory comprising this state remained under the control and jurisdiction of the British government until the year 1796, and that the Ordinance, though made before, was not in force until after that time.

The agreement in writing in this case is express in its terms; the intention of the parties is most manifest. The contract is not to be performed, but is executed. The meaning and intention was to create a lien on the land, to secure the payment of a pre-existing debt. The transaction is not obnoxious to the objection that parol evidence is necessary to establish the claim, for the instrument itself states its object; and however much the policy of enforcing, as an equitable mortgage, the deposit of title deeds with a parol agreement to perfect a legal security, may have been questioned, here no objection of that character exists: the intention is evident, and all the court have to do is to supply the legal deficiencies. See 3d Powel on Mortgages, 1049, and the cases there cited, in which express written agreements have been declared equitable mortgages.

But it is also insisted, that we cannot declare this instrument to be a mortgage because the complainants have not so prayed. The bill expressly charges that this instrument was intended *as* a mortgage, and asks to have it foreclosed *as such*, and contains the usual prayer for other or further relief. In a case where the defendant has submitted to answer, and where the case made by the bill warrants this decree, we see no objection to it for the reason assigned.

The next ground of defence is a presumption of payment arising from lapse of time. The defendants claim that this is a stale demand and that for this reason a court of equity will not enforce it, but will presume it has been satisfied. One of the heirs sets up this defence in his answer: the other defendants, some of whom are minors, have put in only a general answer, denying all knowledge of the matters stated in the bill.

Lapse of time, in connection with non payment of interest and a continued possession of the mortgagor, unaccompanied by any effort on the part of the mortgagee to enforce payment, would warrant a presumption of payment of the debt. This would operate as a satisfaction of the mortgage, and thus give repose to the title. This, however, is not a legal bar, but an equitable, a presumptive one, depending upon a principle co-existent with the earliest jurisdiction of a court of equity, without aid from any act of parliament; and courts of equity, by their own rules, give great effect to the length of time. Smith *v.* Clay, 3d Bro. Ch. R. 640, in note.

All the authorities agree that this presumption may be rebutted by circumstances. 4 Munf. 532; 4 Har. & McHen. 328; 16 John. Ch. R. 214, and the cases there referred to. And although there is some conflict as to the point whether the defendant must insist upon the bar, or whether the plaintiff, in a case bringing him within the rule, shall be required to state the circumstances which repel the presumption, the better opinion seems to be, that such circumstances as entitle the party to relief, notwithstanding the lapse of time, should be stated in the bill. Foster v. Hodgson, 19 Ves. 180; 9 Peters 415.

Here the lapse of time appears upon the face of the bill, which admits that no part of the money has been paid: and as if recognizing he rule which we have just mentioned, it goes on to state such circumstances as are claimed to be sufficient to outweigh the presumption, and still entitle the party to relief. The defendants deny all knowledge of these circumstances, and we think properly, and put the complainants upon the proof of them.

A question is also made as to the character of the evidence by which this presumption is to be met and overthrown, the complainants insisting that slight circumstances are sufficient for this; the defendants, on the other hand, contending, upon the authority of several cases referred to, upon a bill to redeem, that the evidence should be clear, unequivocal, proceeding from witnesses unimpeachable, and upon the whole of the most satisfactory character.

I can see no propriety in making the distinction insisted upon by the complainants, between the evidence necessary to rebut presumption of a grant, from lapse of time, and that required to outweigh a presumption of payment, from the same cause. In case of a mortgage the presumption is adopted as a rule of evidence for the same purpose in both instances, to wit: the repose of the title.

It may be safely remarked, however, that the earliest cases in which parol evidence of facts and circumstances to meet such presumption, was offered, were upon bills to redeem; and it was for some time doubted whether such evidence should be received, and it was not finally determined that it was competent until the case of Reeks *v.* Postlethwaite, Cooper's Ca. in Ch. 164. That was a bill filed to redeem a mortgage, forty-nine years after the date of the mortgage, forty-three years from the time possession was taken by the mortgagee, and thirty-nine years from the time of the plaintiff coming of age.

In determining whether parol evidence is competent for this purpose, the vice chancellor has occasion to consider the rule as to twenty years barring the redemption, and declares it to be not an absolute rule, but a qualified rule, depending altogether upon circumstances. After referring to several cases in which the rule is departed from, as where there have been disabilities of the party, as infancy, coverture, beyond sea, and not only in cases of disabilities, but in receiving interest, keeping accounts, treating it in any wise as a deed or mortgage, he says, that "such acts, and others of the sort, are sufficient to take the case out of the rule, and which may be solemn and deliberate acts or not, according as the party is attending or not attending to what is doing." "There must be evidence that it is a subsisting mortgage."

What precise act, then, will be sufficient? The answer must be, *any* precise act. The acts need not be done with the other party; the mere *ex parte* acts of the mortgagee will be sufficient. Whether the presumption is rebutted, may depend upon a variety of circumstances, and must depend upon the facts in each particular case, as tending to justify or excuse the delay. 16 John. R. 214.

Anything is sufficient which repels the presumption that a man is always ready to enjoy his own, as that the party is a near relative. 12 Ves. 266.

The circumstances to induce a belief that this was a subsisting debt, are, that the mortgage was recorded in 1798, about eight years after Baby's death, and two years after his family left this territory and removed across the Detroit river into the province of Upper Canada; and that as late as 1819, Godfroy sent a message to the heir, which is insisted to be clearly referable to the mortgage. Peter Godfroy, the witness, then lived at home with his father Gabriel Godfroy on this farm, and the message sent by him to Baby was, to come over the river, as they were about to levy on the farm.

There is no evidence to show that Baby had any other interest in this farm than by way of this mortgage; and holding that, and of so ancient a date, it was but natural Godfroy should wish to have him present to assert his claim when the levy was made. These things are strong to show an intention on the part, both of the heirs and of Godfroy, to keep the mortgage on foot for some purpose—for what purpose is now immaterial, if they treated it as a subsisting mortgage, which we think the evidence shows they did. The bill was filed within twenty years after this. But if we are mistaken in the inference drawn from these facts, there is still another view of the case not inconsistent with the one we have been considering, which will bring us to the same conclusion.

It seems to be conceded in this case, that the general period which has been adopted for presumption of satisfaction of a mortgage is twenty years. The complainants contend that this period should commence from the time of administration granted, and not from the time the debt fell due; that until then there was no person competent to sue. Murray *v.* The East India Company, 5 Barn. & Ald. 204, is in point to show that where the cause of action accrues *after* the death of the intestate, the period of the statute of limitations commences from the time of administration granted, and for the reason that there is no person to sue until the administrator qualifies. This reason fails where the debt falls due before the death. In such case there is a person capable of suing, and a subsequent disability will not take the case out of the statute. 16 John. R. 214.

It does not appear, from the evidence in this case, whether Baby died before or after the day when this demand fell due. It is not affirmatively shown that he died before that time, and the evidence seems to be insufficient to bring the case within the principle of Murray *v.* The East India Company. But in case of a presumptive bar from lapse of time, the rule as to subsequent disabilities is different from that under a positive bar created by the statute. 16 John. R. 214.

In a case under the statute, the party, to avoid its effect, must bring himself within some of its savings; whereas, in a case like the present, he may show any circumstances which outweigh the presumption.

It seems to be well settled, that mortgages being part of the personal estate, belong to the personal representatives of the mortgagee after his death, and not to his heirs. See 7 Bac. Ab., Tit. Mortg. E. p. 84, and the cases there referred to, which show that in this matter equity follows the law; that the money shall go into the personal estate, because it came out of it, and that the land is a mere pledge.

The executor of a mortgagee is a proper person to file a bill to foreclose. Where a reconveyance is required, the heir must also be made a party, but for that purpose only. It only remains necessary to apply this principle to the case before us.

It appears that from the time of the death of the mortgagee in 1790 until the appointment of the administrator in 1835, there was no person to whom payment could be made, who was authorized to discharge the debt. Payment to the heir would have been no protection against an action by an administrator, subsequently appointed.

The period, then, if any existed, in which payment could have been made, before administration, was in the year 1790, between the time when the debt fell due and the death of Baby, but this not being shown affirmatively, we cannot intend it.

If that fact was necessary to meet the circumstances set up by the complainants to overthrow the presumption or to render them insufficient for that purpose, the defendant should have proved it. If, then, we are correct in this view, it would seem that, although the general presumption of payment arises from lapse of time, still, if it appears that payment was impossible, that must repel and overthrow such presumption.

From lapse of time during which payment ought to have been made, arises a presumption that it was made: this is met by evidence that the parties were so situated that it could not be made. This gives the defendants the full benefit of the presumption, and puts the complainants upon proof *aliunde*, to show why payment was not made. So a period during which a plaintiff is disabled to sue has been repeatedly held to be properly deducted from the time necessary to make out the presumption. 10 John. R. 417; 16 id. 214.

But it was said, if this was a subsisting debt, administration would not have been so long delayed. To this it might be replied, and equally well, if the demand had been paid, administration would never have been taken, unless we say, what we have no right to say, that there were other demands owing to the estate, of which we have no evidence. This delay to administer, in my judgment, proves nothing one way or the other.

Upon the argument, great stress was laid upon the staleness of the demand, and the consequent disfavor the case would receive in a court of equity. It is true the court does not countenance or encourage negligence, and why? because that negligence furnishes evidence upon which to build a presumption that the right claimed has been abandoned.

It is said that lapse of time is permitted in equity to defeat an acknowledged right, on the ground only of its affording evidence of a presumption that such right has been abandoned. It never prevails where the presumption is outweighed by opposing facts and circumstances. Nelson *v.* Cunningham, 4 Munf. 532; 3 Har. & McHen. 328.

Having come to the conclusion that the delay in this case is accounted for, upon legal principles, it would be equally inequitable to withhold relief upon this claim, as it would upon one of a more recent date.

It results from this, that the decree of the chancellor dismissing the bill must be reversed.

Decree reversed.

MAY v. SPECHT ET AL.

The stipulations contained in the treaty of London, known as Jay's Treaty, for the protection of the rights of property, imposed no new obligation upon the government of the United States, but were only in affirmance of the law of nations.

On the 1st July, 1796, and prior thereto, C. was in possession of certain lands which he conveyed by warranty deed, in February, 1798, to M., who took possession of them under the deed from C., and, in October, 1800, by warranty deed, in which his wife did not join, conveyed them to P., who took possession under the deed to him. By an act of Congress, entitled an act regulating the grant of lands in the territory of Michigan, approved March 3d, 1807, it was provided that the fee simple of any tract or parcel of land that was settled, occupied and improved prior to the 1st day of July, 1796, should be granted to the person or persons in the actual possession, occupancy and improvement thereof, and commissioners were appointed for the purpose of ascertaining and deciding on the rights of persons claiming the benefit of the act. P. claimed the premises before the commissioners under the aforesaid deeds and his possession of the land under them, which claim was allowed, and a patent was subsequently issued to him for the land by the government. In an action brought by the widow of M. for her right of dower, *Held*, she was entitled to dower therein.

ERROR to Wayne Circuit Court. Margaret May brought ejectment, in the circuit court against the defendants, for her right of dower in certain premises conveyed by her husband, James May, in October, 1800, in which conveyance she did not join, to James Peltier, under whom defendants claimed title. The parties agreed on a case or statement of facts, in the court below, which it is unnecessary to give here as the facts are fully stated in the opinion of the court. Plaintiff having failed to sustain her action in the circuit court, brought the cause to this court by writ of error.

Davidson, for plaintiff in error.

Joy, for defendants in error.

By the court, GREEN, J. The question in this case, is, whether James May, the husband of the demandant, was so seized of the premises demanded as to entitle his widow at the common law to dower therein, which is defined to be "the third part of all the lands whereof the husband has been seized during the coverture, of such an estate as the children by such wife might by possibility have inherited, and to which, by the death of her husband, the wife is entitled for her life." 3 Bac. Abr. 191.

The land was conveyed by warranty deed indented, bearing date the 1st February, 1798, from Catharine St. Aubin, widow and representative of the late Claude Campau, and Bernard Campau, her heir apparent, to the demandant's husband, to whom, on the second day of February, in the same year, peaceable and quiet possession and seizin of the same was delivered by the grantors in the presence of witnesses, according to the form of delivery then used. Bernard Campau, one of the grantors, was in possession of the premises prior to the 1st July 1796.

On the 10th October, 1800, James May, by warranty deed indented, conveyed the premises to James Peltier, who entered into possession of them, and continued in possession until he received the patent therefor from the government of the United States, pursuant to the act of Congress of 3d March, 1807.

James Peltier claimed the premises before the commissioners named in said act, under and by virtue of the deeds of conveyance aforesaid, and his own possession thereunder, which claim was established, and allowed by the commissioners on the 18th day of July, 1807.

The marriage of the plaintiff with James May in 1797, and his death in 1829, were admitted on the trial, and it was also admitted that the defendants were in the peaceable possession of the premises, or some portion thereof, deriving title thereto through and from Peltier.

It was supposed on the argument of this cause by the counsel for the plaintiff, that by the treaty of London, known as "Jay's Treaty," the possession of May's grantors was assured to them as a title to the land, and vested the property in them. By reference to the facts in this case it is apparent that that treaty can have no application, having been concluded in 1794, and ratified in 1795, and it not appearing that they were at that time in possession of the land. Moreover, the stipulations contained in the treaty for the protection of the rights of property, imposed no new obligation upon the government of the United States, but were only an affirmance of the law of nations. 5 Wheaton 518; 4 Peters 512; 9 *id.* 711, 712; 7 *id.* 87.

It is then contended on the part of the plaintiff, that the confirmation of the title in James Peltier was a confirmation of the title in every one from or through whom he claimed title, and, by relation, made such title as good and effectual for all purposes, as if the confirmation had been made to May's grantors, who were in possession on the 1st of July, 1796; or that, if such was not the legal effect of the patent to Peltier, yet he and those claiming under him are estopped by his deed from May from denying the title in May which his deed purports to convey.

First, then, as to the effect of the confirmation of the title in Peltier; and this must depend upon the true construction of the act of congress before referred to.

The second section of that act provides, "That to every person or persons in the actual possession, occupancy and improvement of any tract or parcel of land, in his, her or their own right, at the time of the passing of this act, within that part of the territory of Michigan to which the Indian title has been extinguished, and which said tract or parcel of land was settled, occupied and improved by him, her or them, prior to and on the first day of July, one thousand seven hundred and ninety-six, or by some other person or persons under whom he, she or they hold or claim the right to the occupancy or possession thereof, and which said occupancy or possession has been continued to the time of passing this act, the said tract or parcel of land thus possessed, occupied and improved, shall be granted, and such occupant or occupants shall be confirmed in the title to the same as an estate of inheritance in fee simple." U. S. Land Laws, 545, 546. The third section of the same act provides for the issuing of certificates to the claimants, and for the issuing of patents in like manner as for other lands of the United States.

For the defendants it is claimed that all who occupied the lands prior to the patent to Peltier, were and are still to be treated as intruders upon the public domain, and that the title being in the government, May had no seizin upon which his widow can claim dower.

It must be conceded, from the facts appearing upon the record, that the paramount legal title was in the government up to the time of the issuing of the patent to Peltier; and that if the act of the 3d March, 1807, had not been passed, and this parcel of land had been granted by the government to a stranger who should have purchased under the general laws for the sale of government lands, such purchaser, for any thing that appears in this record, would have thus acquired a legal *adverse*, and paramount title.

In order properly to determine the effect of this grant, it becomes necessary to inquire what would have been the rights of the plaintiff, as against the defendants, had no legislation been had by congress in reference to the land, and no act done by the government asserting its title. In Bowne *v.* Potter, 17 Wendell, 167, Mr. Justice Nelson lays down the well established rule as follows: "Under our modern deeds of conveyance, the grantee in fee, taking possession, may defend successfully his *title* and *possession* against all the world, except the true owner. This position he acquires by means of his conveyance and possession, and until evicted by the paramount title, there seems to be no good reason for extending to him the favor of disputing the title under which he enters and holds. While undisturbed, he is enjoying the estate granted, and it is to be presumed that he has provided, by proper covenants, against any future failure of title and eviction."

The delivery of the deeds, both to and from May, as well as from Peltier, or his grantees, to the present defendants, having been accompanied by an actual delivery of the possession, and the full and entire enjoyment of all the estate granted, there can be no doubt in the case supposed that the plaintiff would have been entitled to her dower; nor could there be any doubt, in that case, that a prior mortgage executed by May, would have held the premises as against Peltier or his grantees, and that upon a foreclosure of the equity of redemption, the mortgagee would have a right to remove any occupant from the possession of the premises, unless such occupant be in by title paramount.

In the case of Bancroft *v.* White, 1 Caines' R. 185, which will be noticed hereafter for another purpose, the paramount title to the land in question, when entered upon by Hawes, the husband of the demandant, and when he conveyed the same was in the state, and it was insisted that his possession was an usurpation or intrusion upon the public domain of the state, and not a seizin; while it was conceded that in any other case but that of lands so circumstanced, his possession might be a seizin. Kent, J., in delivering the opinion of the court, says: "The court do not regard lands in the town of Canaan as an exception to the general rules which would apply in case the suit had been for lands in another town."

Assuming, then, that the plaintiff would be entitled to recover had no action been had by congress affecting that right, we are prepared to consider the effect of the patent to Peltier. And here it may be remarked, that if the act of congress under which the patent issued, declares, in clear and explicit terms, what its operation and effect shall be, there will be no occasion to consider the power and effect of patents issued under the general laws relating to the sale and disposition of the public lands. In the section of the act before recited, we find a recognition of the several legal *rights* in reference to these lands, under which other lands may be possessed. The person who is to receive the patent must be in possession *in his or her own right*, and not in the right of another, at the time of passing the act; and the land must have been so occupied by him or her, prior to and on the 1st day of July, 1796, or by some other person or persons, under whom he, she or they *hold or claim the right* to the occupancy or possession thereof. Under such circumstances the land is to be granted, *and such occupant or occupants shall be confirmed in the title to the same as an estate of inheritance in fee simple.* What title is the occupant *confirmed in* by this grant? The title under which he held at the time of the passing of the act; and not a new title created in him by the patent. Any other construction of this language, would involve the absurdity of vesting a man with an adverse title, based upon and in affirmance of the title under which he claims and holds the lands in question. But this is a mere voluntary release by the government—a recognition of the truth and justice of the claim of the occupant, and cannot, by any fair construction, be treated as an assertion of the paramount title of the government, in *opposition* to such claim.

It would seem to follow, as a necessary result, that the confirmation of the title in Peltier, which extinguished the title of the government, must forever prevent those who derived their title through him from setting up the government title in opposition to the one under which Peltier held at the time of the confirmation: in other words, that the confirmation by the patent to Peltier must be treated as taking effect, by relation, upon the title of May; and confirming it as an estate of inheritance in fee simple in him, entitling his widow to dower.

The case of Bancroft *v.* White, before referred to, was not as strong in favor of the demandant as this. Hawes, the former husband of Lois Bancroft, during the coverture, entered upon the demanded premises, and held and used the same in his own right for several years, and on the 1st of November, 1786, by deed of bargain and sale, conveyed the same to Jacob Brooker, in fee, with covenant of warranty. On the 8th of June, 1795, Brooker and wife conveyed the premises by a similar deed to Gardner, and on the 23d of September, 1799, Gardner and wife, by a similar deed, conveyed the same premises to White, the defendant. Each of the several grantees entered by virtue of his deed, and occupied in his own right.

By an act of the legislature of the state of New York, entitled "An act for the sale and disposition of lands belonging to the people of this state, and for other purposes therein mentioned," passed the 22d day of March, 1791, it was enacted as follows, to wit: "That all the estate, right, interest, claim and demand of the people of the state of New York of, in and to any lands, tenements or hereditaments in the town of Canaan, in the county of Columbia, now possessed by any person or persons, shall be, and hereby is, granted to the *respective possessors* of such lands, tenements and hereditaments, and to the heirs and assigns of *such possessors*, respectively, forever: provided always, that such possessors shall be construed and taken to be the person or persons holding in his or her own right, and not occupying and improving in the right of another." Here the lands &c. were *granted* to the *person or persons in possession*, and to the heirs and assigns of *such person or persons*, and no words of *confirmation* are used in the act, and no reference is made, unless implied from the language of the proviso, to any title or claim of title, which might have existed in any prior occupant or other person. Yet the court in that case say, "in the present case the tenant claims in fee under title derived from the husband," and judgment was rendered in favor of the demandant.

From the view we have thus taken of the case, it becomes unnecessary to consider the severe and rigid doctrine of estoppel, as it has often been applied, to shut out facts, and override the principles of natural justice and good conscience between men.

It is said on behalf of the defendants, that this claim of dower is against equity, conscience and justice, and ought not to be allowed but upon the ground of strict law only; and that the very claim of dower now set up was warranted against and paid for.

We are by no means disposed to strain the provisions of law, or make them expand to embrace this claim; on the contrary, we place it entirely upon strict legal ground. As to its justice, it may be remarked, that the warranty against it is the protection of the party against injustice, and shows that it was in the contemplation of the parties when the covenant was made. The covenant of warranty of quiet possession runs with the land, and must be presumed to be an ample protection against the assertion of the right of dower, being that which the purchaser has provided for himself.

The judgment of the circuit court must be reversed, with costs to the plaintiff in error, and a new trial granted.

Judgment reversed.

THURSTON *v.* PRENTISS ET AL.

A. and B. became surety for the payment of two judgments against C., by the 16th July thereafter, and C. executed and delivered to them his promissory note and mortgage for $600, payable the 1st of August following, upon the understanding and agreement, that if C. paid the judgments and saved them harmless from all costs, trouble and expense on account of their having become surety for him, the note and mortgage were to be canceled. C. failed to pay the judgments. *Held,*

1st, That A. and B., after the note and mortgage fell due, might foreclose the mortgage at law, by advertisement and sale under the statute, to raise the money to pay the judgments, and rid themselves of their responsibility.

2d, That A., who purchased the premises on the mortgage sale, held them subject to the right of C. to redeem, on paying the amount A. had paid as surety for the mortgagor, with the costs of foreclosure and interest, and that a third person who purchased the premises of A., with a knowledge of the facts, took the land subject to the mortgagor's equity of redemption.

A surety who pays usurious interest to obtain time to pay the debt of his principal in, cannot collect the excessive interest so paid by him of his principal.

Where judgment is confessed by principal and surety on a note given for money loaned, including usury, and execution is taken out and levied on the goods of the surety who pays the judgment, the principal is liable over to the surety for the usury paid by him, as well as the sum actually loaned with interest.

A decree may be made between co-defendants, grounded upon the pleadings and proofs between complainant and defendants.

Where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and the party is confined to that remedy only; as to recover three-fold the amount of usurious interest paid, under R. S. 1838, p. 161, sec. 7.

Appeal from the Court of Chancery. Case reported in Walk. Ch. R. 529.

Backus, for appellant.

Terry, for appellees.

By the court, Wing, J. On the 15th of March, 1839, appellant applied to Azariah Prentiss, one of the defendants, for the loan of $300, and it was agreed between them that appellant should receive of Prentiss this sum, upon the terms that appellant should allow to Prentiss the sum of $100 for the use of the $300, or at the rate of sixty per cent, until the 16th day of July, when the sum loaned and interest was to be repaid; and appellant was to procure some one to sign with him two notes, each for $200, upon which they should confess judgments the same day, and that such judgments were to be stayed. Accordingly, appellant procured David Phelps to execute two notes with him to Prentiss, for $200 each, upon which they confessed judgments before a justice, and John Price became security for stay of execution in both judgments, until the 16th of the then next July. And then Prentiss delivered to appellant the $300; and appellant, at the request of Phelps and Price, executed and delivered to them his promissory note for $600, made payable on the 1st day of August then next, secured by mortgage, which note and mortgage were executed to Phelps and Price upon the understanding and agreement between them and appellant, that if he should pay the amount of the judgments and save them harmless from all costs, trouble and expense, on account of their having become surety for him on the judgments, then the note was to be given up and the mortgage canceled. After the expiration of the stay of execution, executions were sued out upon both of the judgments, and levied upon the personal property of Phelps, and he endeavoured to induce appellant to pay the executions, but without success. Phelps therefore, to save his property from sale on the executions, executed to Prentiss a mortgage on his own farm, for the amount of said judgments and ten per cent interest, payable 1st July, 1841. The executions were withdrawn. After the note to Phelps and Price fell due, they foreclosed their mortgage under the statute; and on the 4th day of November, 1839, Phelps bid in the mortgaged premises for the sum of $488, and afterwards, on the 27th day of August, 1841, he assigned his certificate of purchase, and Price united with him in assigning the note and mortgage to Crissman for the sum of $500, of which sum they paid Prentiss, on the 27th August, 1841, the amount supposed to be due to him; since which period Crissman has held the note, mortgage and certificate.

The defendants are charged in the bill with having combined to get appellant's farm for their common benefit, and that all of the defendants except Dolby were originally concerned together in the scheme of loaning the money, taking the note of $600 and the mortgage to secure it, and in its foreclosure, and that all were advised of the usury in the loan before they received or purchased the note and mortgage.

There is no proof of combination between the defendants. The defendants deny any knowledge of the usury except Prentiss; he says he is unable to say how it was, as two years had elapsed since he loaned the money. But it is abundantly proved that Prentiss loaned the money to appellant at the rate of sixty per cent per annum: that Phelps and Price were present at the time the money was counted, and Phelps handed it over to appellant, and that he only received $300. Crissman was fully advised of the usury long before he took an assignment of the note, mortgage and certificate. The illegal interest reserved in the notes and judgments did not avoid them; the statute authorized the collection of the amount loaned, and legal interest, deducting the usury.

At the time the mortgage was foreclosed, neither Phelps nor Price had been damnified by reason of their having become sureties for the appellant, neither did they pay any sum upon the judgments until August, 1841. The question arises, whether they were authorized, by the terms upon which they received the note and mortgage, to proceed to enforce the collection of the note by foreclosure of the mortgage, at the time they did so. After a careful examination of the bill, answer and proofs, I am satisfied Phelps and Price were authorized, and it was legally competent for them to foreclose the mortgage immediately after it fell due. The judgments had become due, and appellant had failed to pay them. The stay of execution was not entered pursuant to the statute, and therefore it did not operate to stay the executions; but it appears Prentiss did not take out executions until after the period it was agreed the judgments should be stayed. There is no condition expressed in the note, upon which it is to become due. It is like any other negotiable note. Then, assuming the understanding between appellant and Phelps and Price, in reference to the note and mortgage, to have been as stated, I am satisfied they were intended for something more than simple indemnity. Phelps and Price were bound to pay the judgments when they fell due, and when appellant failed to pay, they had the right to foreclose the mortgage to raise the means to pay the judgments, and rid themselves of the responsibility they had incurred. The amount they had to pay was certain. It is otherwise where the agreement is to save another from *damage* by reason of any matter, for that would be a security to indemnify. See this doctrine discussed and explicitly stated and explained in 1 Saund. 116, n. 1: Holmes v. Rhodes, 1 Bos. & Pul. 638; Hodgson v. Bell, 7 T. R. 97; 17 John, R. 239, 479; 7 Wendell 499; Penny v. Foy, 8 Barn. & Cress. 11; Theobald's Prin. & Surety, 231; Thomas v. Allen, 1 Hill 145; 19 Wendell 423; 8 Cowen 631, 639; 3 Denio 323, 327.

I do not find anything in the pleadings and proofs which should subject appellant to the payment of any sum on account of the extra interest agreed to be paid by Phelps to Prentiss, and secured in his mortgage. I lay that transaction entirely out of the case, as I think Phelps was not authorized to contract for further delay upon the terms of paying usurious interest.

Phelps and Price paid the amount due to Prentiss. Appellant did not interfere to protect them from paying either the amount actually loaned, or the usurious portion of it, and they were not bound to litigate the matter with Prentiss, to get rid of the usury. Appellant might have done so, and he was the only person interested in reducing the amount to be paid; but he neglected to interfere for the protection of his sureties, and Phelps was liable to have the judgments enforced against him. By his paying the whole, including the usury, the appellant became bound to refund, or allow the same amount on settlement with him.

Then, if the foreclosure was binding upon the mortgagor, what right did the mortgagee acquire by his purchase at the sale of the mortgaged premises? Had a third person become the purchaser, who was unacquainted with the usurious character of the original transaction, no doubt he would have acquired a perfect title as against the mortgagor, to the mortgaged premises after the period allowed by law for the redemption had expired; and if the premises were redeemed, he would have been entitled by law to exact and receive ten per cent interest on the amount paid by him at the purchase. But did the mortgagee occupy the same position, with the same rights? It is true, that under the statute it was competent for him to purchase, but he could not, by his purchase, divest the land of the equities which existed between him and the mortgagor. If the mortgagor had gone forward and paid Prentiss the whole amount due him, and thus released Phelps from all liability to Prentiss, immediately after the foreclosure, he could have enforced from Phelps a relinquishment of all interest in the mortgaged premises, upon paying to him the expenses of the sale. If a third person had purchased and paid the amount of the bid to Phelps, Phelps could only have retained so much as would be sufficient to pay Prentiss and the expenses of the sale: any balance that he might have received would have belonged to the appellant. Then, as Phelps held the certificate of sale (no matter how much he had bid), subject to a redemption by the mortgagor, by his paying to him the amount for which he was liable to Prentiss, or which he might have paid to Prentiss, together with the expenses of sale, did he divest these equities by an assignment of his interest to Crissman, who was fully advised of the facts? I think not, for the assignee with notice could only acquire the rights of the assignor, consequently appellant is entitled to redeem by paying to Crissman the amount of the two judgments, with legal interest, together with the expenses of foreclosure.

Appellant insists that it is competent for this court to decree that Prentiss shall pay back to Phelps, or appellant, the amount of the excess of interest paid to him by Phelps. He insists that it is competent for this court to decree repayment either to the one or the other.

It is no doubt true that a court of equity may make a decree as between co-defendants, grounded upon the pleadings and proofs between complainants and defendants. It is the constant practice of courts of equity to do so, to prevent multiplicity of suits. See 2 Sch. & Lef. 710, 718; 2 Ball & Beatty 255; Jones *v.* Grant, 10 Paige 350. The chancellor might have decreed that Phelps should refund to Crissman the difference between the amount he may receive from appellant and the amount he paid to Phelps. But as the defendants did not appeal, and appear to have been satisfied with the decree of the chancellor, and their counsel does not now ask it, we do not feel authorized so to decree. Neither could we decree a repayment of the excess of interest, received by Prentiss, to Phelps, for the same reason. And we cannot decree that Prentiss shall repay to appellant the excess received by him above the $300 loaned and legal interest, even assuming that the payment made by Phelps was for appellant, and that it may be considered as his act. If the bill of complaint had been filed and injunction granted before Phelps had paid Prentiss, there would have been no difficulty in decreeing a satisfaction of the judgments on the payment to Prentiss of the $300 and legal interest; but the bill was filed after Phelps had paid to Prentiss the amount of the judgments, with ten per cent interest thereon. It was upon the ground that the chancellor refused to decree that Prentiss should repay the excess of interest, that the appeal was taken from the decree of the chancellor to this court.

In England it has been held, that though their statute does not go so far as to make the party receiving the usurious interest liable to refund, yet as it prohibited the taking beyond such a sum and avoided the contract, the taking was a breach of the statute; and the actual receipt of the money will (in a court of equity) make him liable to refund: the wrong being the same whether the usurious interest hath been actually paid or not. 10 Bac. Abr. 293, G, new edit. In 1 Story's Eq. Juris. sec. 302, it is stated, that if the borrower has actually paid the money upon an usurious contract, courts of equity, and, indeed, courts of law also, will assist him to recover back the excess. This doctrine is based upon the English decisions.

It is true, as a general proposition, that where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rules of law as to participators in a common crime, will not at present interpose to grant any relief—acting upon the known maxim, *in pari delicto potior est conditio defendentis, et possidentis*. In cases of usury, the rule is somewhat different. As we have seen, in England their statute of usury declares all such contracts, and all the securities taken under them, void; and their courts of equity follow the law courts in the construction of the statute. If the lender comes into a court of equity seeking to enforce the contract, the court will not aid him; but if the borrower seeks relief in that court, it will relieve him against the usurious portion of the contract only upon the terms of his paying the actual amount loaned and interest; and it is upon this principle, that if the borrower has paid the money upon an usurious contract, courts of equity will assist him to recover back the excess paid above lawful interest. The borrower is not held to be a *particeps criminis*, and it is no just objection to say that *volenti non fit injuria*, for if *in delicto* he is not in *pari delicto*. His is the case of a man who from mere necessity pays more than the other can in justice demand, and who has been significantly called the slave of the lender; and as to being *particeps criminis*, he stands *in vinculis*, and is compelled to submit to the terms which oppression and his necessities impose upon him. 1 Story's Eq. Juris. 302. But, as we have said, the decisions at law and in equity in England are founded upon their statutes. With us the subject of interest on loans is governed by a special statute, and excludes the application of common law principles, either to rights or remedies growing out of contracts made under it.

The third section of R. S. 1838, p. 160 (under which the loan in this case was made), declared that the rate of interest should continue to be at the rate of seven dollars, and no more, upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time. The fourth section, unlike the English statute, enacts, that "none of the securities whereby or whereon a greater rate of interest has been directly or indirectly reserved, taken or received than is allowed by law, shall be thereby rendered void; but the same may be enforced as provided in this chapter." What are those remedies? They are found in the fifth and seventh sections of this chapter, and they are two-fold:

1. In any action brought on any contract or security in which usury is reserved, if the fact is made to appear, the defendant shall recover his full costs, and the plaintiff shall forfeit three-fold the amount of the usurious interest so reserved, taken or received, and shall have judgment for the balance only which shall remain due after deducting from the principal and lawful interest the said three-fold amount.

2. The party paying the usurious interest may recover back three-fold the amount of the excess of interest paid in an action of debt: provided, such action shall be prosecuted within one year from the time when such interest shall have been paid.

These are the only remedies prescribed by the statute, and resort cannot be had to any other.

Our statute is nearly a literal copy of the statute of Massachusetts: with this difference, however, that the Massachusetts statute authorizes the recovery of three-fold the whole interest paid by an action of debt, *or by a bill in chancery.* Our statute only authorizes an action of debt.

It is a well estalished principle of law, that where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued; and a party seeking the remedy is confined to that remedy, and that only. 1 Com. Digt. 44-7-8; 9 Bac. Abr. 259, 260; 2 Burr. 803; 1 Blackf. R. 405; 2 Saund. Pl. and Ev. 829; 5 John. R. 175; 3 Mass. 307; 5 *id.* 514.

In the case of Wiley *v.* Yale, 1 Metcalf 553, it was held by the supreme court of Massachusetts, that a party who paid a greater rate of interest than was allowed by law, could not recover back three-fold the amount of interest paid, by an action of trespass on the case, but only by an action of debt or a bill in chancery, as provided by their revised statutes.

In a subsequent case in Massachusetts, Crosby *v.* Bennett, 7 Metcalf 17, the point raised in this case was directly decided by the supreme court of that state. An action for money had and received, was brought to recover the amount of interest paid above six per cent. It was urged by the counsel for the plaintiff, that the action lay after their revised statutes had given the action of debt or bill in chancery—that those remedies were only cumulative. In support of this position, he cited 2 Com. on Con. (1 ed.) 113, and cases there cited; Wheaton *v.* Hibbard, 20 John. R. 290. Ch. J. Shaw, in delivering the opinion of the court, says: "The authorities cited certainly tend to show that so long as an usurious contract was declared illegal and void, it followed, as a necessary consequence, that money paid thereon was taken illegally, and was oppressively extorted from the borrower, and, therefore, that this equitable action would lie to recover it back: but now the revised statutes expressly declare that no such contract shall be void, and in order to restrain the taking of usurious interest, the statute goes on to make specific provisions. The consideration that now by law the contract is not void, distinguishes this case from those cited, and takes away the ground upon which they rested. The ground upon which it was formerly held that an action for money had and received would lie, was, that it was illegal and oppressive to take more than six per cent. interest, and, therefore, it could not conscientiously be retained from the person who paid it. But under our statute, the contract is not illegal, and the party who has suffered by paying usurious interest is confined to the statute remedies. The right to recover back three times the amount of the usurious interest is given by the statute to the party who has paid, and is partly in the nature of an equitable action to recover back money which the defendant cannot conscientiously and justly retain, and partly in the nature of a penalty. So far as the statute affords a remedy to recover back money wrongfully taken—it is a substitute for the remedy at common law. If, therefore, the party might waive the statute and sue at common law, he would avoid the provision limiting such action to two years from the payment, contrary to the manifest intent of the legislature and the policy of the law." The reasoning in this decision, it appears to me, is conclusive, and shows that the appellant cannot have, nor can either of the defendants have, any redress against Prentiss in this suit. See, also, 1 Metcalf 553, 398; 6 *id.* 296.

The statute gives the only remedy, and the parties are confined to it; the contract was made in referene to it; and even if the remedy by statute was repealed, yet the parties would not be entitled to a remedy in a court of equity, or by an action for money had and received. 9 Bac. Abr. 226-8; 1 Hill 333-5.

NORRIS ET AL. v. HILL.

Where N. and M. owned a water power with a grist mill and saw mill, as tenants in common, and they divided a part of the property so held in common between them, one taking the grist mill and the other the saw mill, and executed releases to each other, the releases must be taken and construed together as one instrument, and with reference to all the surrounding circumstances to which they obviously and directly point; and by such circumstances, not only the parties, but all persons claiming title under them, are bound.

It is a general rule of law and equity, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact.

A grant of land bounded by a stream, carries with it the bed of the stream to the centre, unless a contrary intention clearly appears from the conveyance itself.

The provision of R. S. p. 509, conferring jurisdiction, in cases of nuisance, on equity courts, was not intended to extend or enlarge their jurisdiction.

Where complainants owned the water power on the east side of a river, and one half of the water power on the opposite or west side—the defendant owning the other half, and defendant had occasionally used more than his share of the water on the west side of the river, but no suit had been brought against him for doing so, and complainants had no machinery on that side of the river to be propelled by water, an injunction will not be granted restraining defendant in the use of the water.

Where complainants, who were the owners of three-fourths of a water power, were compelled to purchase a piece of land to secure to the proprietors of the power the right to flow it, a court of equity will not decree contribution by the owner of the other fourth of the water power.

APPEAL from the Court of Chancery. Norris and Follett, the complainants, and the defendant Hill, were the owners of separate mill property on the Huron river, at Ypsilanti; their mills being on opposite sides of the river, and supplied with water by a dam extending across the river from one bank to the other. Complainants were the owners of the water power on the east side of the river, where their mills were, and claimed to be the owners of one half of the water power on the opposite or west side of the river, where Hill had his mills, and they filed their bill in the court below against Hill and others, to restrain defendants from using more than their proportion of the water, and to have the rights of the respective parties to the use of the water determined: also to compel Hill to pay a just proportion of certain purchase money that had been paid by complainants for lands flowed by the dam, in order to secure the right of flowing them. The court below having made a decree in favor of complainants, Hill appealed. The facts are fully stated in the opinion of the court.

Backus & Lane, for appellees.

Buckbee & Emmons, for Hill, the appellant.

By the court, GREEN, J. The defendant seeks to reverse the decree made by the chancellor upon two grounds: 1st, That if the complainants have shown any wrong on the part of the defendant, they have an adequate remedy at law, and he therefore claims the same benefit as if he had demurred to the bill for that cause: and 2d, That the defendant has done no act which is in violation of the complainants' rights, even if such rights exist to the extent claimed by the bill.

In order to arrive at a satisfactory solution of the questions involved, it will be necessary, in the first place, to inquire what are the rights of the respective parties in reference to the subject in controversy. For this purpose, it will not be necessary to go back beyond the 1st of April, 1831, at which time, as the pleadings and proofs show, Norris and Mc Intyre were the owners, as tenants in common, of about three acres of land in Ypsilanti, on the west side of the Huron river, and extending along the river above and below the mill dam, one end of which was attached to the west bank of the river, with a *saw mill and grist mill*, and other buildings thereon. The deeds from Hardy and wife to Norris, and from Reading and wife to McIntyre, under which they held, both described the premises as being bounded on one side by the river, and there can be no doubt that they owned the land to the thread or centre of the stream, according to the general rule of law, that persons who own lands on the different sides of a private stream, hold to the middle of the stream, unless the language of the grants under which they hold clearly shows the intent of the parties to fix the boundaries at the edge of the stream. People *v.* Canal Appraisers, 13 Wendell 355; Lunt *v.* Holland, 14 Mass. 149; Arthur *v.* Case, 1 Paige 447.

At the same time, Norris owned the land to which the dam was attached, on the east side of the river, upon which he has since erected hydraulic works, whereby he and those claiming under him were and are entitled to one half of the usufruct of the water secured by the erection of the dam, as *an incident* to the ownership of the land on that side of the stream. 1 Paige 447. This separate ownership of Norris constituted a separate and distinct interest, as much so as if it had been owned by any other individual; and in considering this case, therefore, for the purpose of ascertaining the true rights and interests of the parties involved in the controversy, regard must be constantly had to this state of things.

From the period before mentioned until the 29th of September, 1832, Norris and McIntyre continued to be the owners of the mill property on the west side of the stream as tenants in common, and as such they were entitled to the use of one half the water raised by the dam, for the purposes of their mills. On the last mentioned day, each of them, by deed of that date, released and quit claimed to the other a portion of the common property; and the main difficulty in settling the rights of the parties will be overcome, if we shall be able to arrive at a satisfactory construction of those deeds.

The description in the deed from Norris and wife to McIntyre is in the following words:

"The equal undivided half of, in and to all and singular that certain tract or parcel of land situated in Ypsilanti aforesaid, on which is erected a saw mill, and more particularly described as follows: Beginning at the north east corner of the Godfrey tract so called, running thence down the Huron river to within thirty eight feet of the west end of the mill dam attached to the flume of said saw mill, thence west two rods, thence south three rods, thence east to the Huron river, thence down the river Huron to the south east corner of said saw mill, thence a westerly course to a stake and stones placed as a corner on the west line of said mill lot, thence north thirteen degrees and forty five minutes west four chains and five links to a corner on the north line of the Godfrey tract so called, thence easterly on said line to the place of beginning; and also a free discharge of water from the said saw mill, or such other buildings as the said Timothy McIntyre shall erect, through and under the grist mill owned by the said Mark Norris, and without any obstruction on the part of the said Mark Norris."

The deed from McIntyre and wife to Norris contains the following description, to wit:

"The equal undivided half of, in and to all and singular that certain tract or parcel of land situate in Ypsilanti aforesaid, on which is erected a grist mill and a building formerly used as a pail factory, and more particularly described as follows, viz: Beginning a short distance below the said pail factory, at the river Huron, north eighty degrees east of a crotched red oak stump standing on the top of the bank, running from thence to said crotched stump, thence south eighty degrees west two chains and twenty two links to a stake and stones placed for a corner, thence north thirteen degrees and forty minutes west two chains and twenty five links to a stake and stones, thence on an easterly course to the south east corner of a saw mill there standing, immediately above said grist mill, thence south to the place of beginning, it being the south part of the mill property heretofore owned by said McIntyre and Norris, and purchased by them of Asa H. Reading and David Hardy."

By these deeds, a division of so much of the common property was effected as is covered by them; and they must be taken and construed together as one instrument, in the light of all the surrounding circumstances to which they *obviously* and *directly* point; for by such circumstances, not only the parties to the deeds, but all persons claiming under them are bound, it being a general rule of law and of equity, that "when a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact." 1 Story's Eq. Jur. sec. 400; 3 Mason 531; 2 Ch. Cases 246; Ambler's Rep. 311; 2 Fonb. Eq. b. 3, ch. 3, sec. 1, note b.

It appears, then, that at the date of these deeds, there was upon the part conveyed to Norris a *grist mill*, and on the part conveyed to Mc Intyre a saw mill; and by reference to the deeds under which Norris and McIntyre held the premises, it appears that such mills were on the premises at the time of their respective purchases from Reading and Hardy; and that by such purchases they became the owners of the land to the thread of the stream, and as such were entitled to one half of the usufruct of the waters of the Huron river. The partition deeds also show that there was a dam connected with the west bank of the river, upon the common property; one half of which, or that portion of it which extended from the thread of the river to the west bank, and a small piece of land extending two rods beyond the west end of the dam, were omitted in the partition, and continued to be holden in common by the parties.

It is conceded, as a legal consequence resulting from this state of facts, that Norris and those claiming under him were and are entitled to an equal share of the water right on the west side of the river, with McIntyre and those claiming under him. By reference to the description of the eastern boundary in the partition deeds, as located by the actual survey which was exhibited in the proofs, it clearly appears that neither party could draw water from the dam, to be used on his separate lands, without using some portion of the common property for that purpose.

The description in the deed from McIntyre to Norris, as "being the south part of the *mill property* heretofore owned by said McIntyre and Norris, and purchased by them of Asa H. Reading and David Hardy," and as being that part "on which is erected a *grist mill*," and the description in the deed from Norris to McIntyre, as being that part "on which is erected a *saw mill*," lead us directly to the fact that these premises were devoted to milling purposes, and that in order to make them available for such uses, the water must be drawn from the dam by means of a race or flume, with the necessary bulk-head, gates, &c.

By the term "*grist mill*," in the deed from McIntyre to Norris, must have been intended a mill with all the necessary incidents connected with it, to make it available as such, as contradistinguished from a mere building; for this term is immediately followed by the woads, "and a *building formerly used as a pail factory*."

Being led to these facts and circumstances by the deeds themselves, under which the parties to this suit claim title, we are put upon the inquiry, what was the mode of using the water from the dam for the purposes of the mills by the respective parties at the date of the deeds? And upon this point we find the proof sufficiently clear and satisfactory. The water was conveyed from the dam to the respective mills, by means of a flume, divided at the head-gates by a partition, one branch of which extended to the saw mill, and the other to the grist mill; and the flume, or that portion of it which was used in connection with the grist mill, was situated on the easterly side of that which communicated with the saw mill, and beyond the margin, or over the bed of the river.

From these premises the first, and perhaps the most important, question arises, as to the extent of the several grants from McIntyre to Norris, and from Norris to McIntyre: in other words, whether, by virtue of such grants, they respectively became entitled to the land to the thread or middle of the stream, or whether they were limited by the margin of the river.

The defendant insists, and his counsel have argued with much earnestness and great ingenuity, that these grants carry the parties to the middle of the stream, with the exception of the strip three rods in width at the west end of the dam, and including the land on which the dam stands; and that, inasmuch as no easement is reserved by or granted to Norris, to enable him to carry the water from the dam across the lands granted to McIntyre, the right which he is conceded to have to the usufruct of one-half the water on the west side of the river, as incident to his common ownership of the land on which the dam stands, is, and must remain, wholly unavailable to him. If this be the true construction of the partition deeds, the defendant, Hill, holding the title which McIntyre had, is made perfectly secure, for all beneficial purposes, in the entire use of one-half the water of the river. In support of this construction, reference is made to the grant by Norris to McIntyre of the right to a free discharge of water from the saw mill, or such other buildings as McIntyre should erect, through and under the grist mill owned by Norris.

The well established doctrine was laid down in the case of The People *v.* The Canal Appraisers, before referred to, as to the right of riparian proprietors; and unless a contrary intent of the parties clearly appears from the deeds under which they hold, such proprietors hold to the thread of the stream. That intent must be gathered from the entire instrument, which is to be construed in reference to the subject of the grant, and the surrounding facts and circumstances to which it leads.

Several of those facts and circumstances have been referred to, and so much of the language of the deeds as is material for that purpose has been noticed. It is evident, then, that the parties did not undertake by their deeds of partition to divide the whole property owned by them as tenants in common. The dam, and the land on which it stands, and a piece of land extending two rods beyond the end of the dam, were still retained as common property, and the right to an eqnal use of the water, as incident to such common ownership, still remained as before; and the land covered by the water raised by the dam, must of necessity subserve the same common purpose, so long as the dam should be kept up, that it had done before. There is nothing in the deeds that implies any intent by either party to abandon the use of the water for the purposes of the mills then in operation; but on the contrary, every thing in the language of the deeds implies that both parties contemplated the continued use of it for such mills, or others which they might afterwards erect.

By limiting the parties to the boundaries fixed by their grants respectively, their legal and equitable rights to the usufruct of the water are protected. By extending those boundaries to the middle of the stream, the just rights of one party are practically taken away and conferred upon the other.

In view of all these considerations, there can hardly be any doubt as to the proper construction of the deeds, nor but that the parties must clearly have intended to limit themselves by the bounds they prescribed. This construction renders the grant by Norris to McIntyre of a right to a free discharge of water through and under his grist mill, entirely consistent with the claim of the complainants to an easement for the purpose of a flume over the bed of the stream; for neither of them reserved or conveyed, by any express language in the deeds, any easement in or over the common property; and if one of them might use it, the other had the same right.

The defendant, George Hill, holding the title which McIntyre had, has the same rights which McIntyre possessed, and no greater, unless intervening circumstances have occurred to extend them. But it is contended that when he purchased of Ballard, the old flume which had been used by Norris to supply his mill had been removed, and the use of the mill abandoned by Norris, and that he purchased in good faith, without knowledge of Norris' right, if any he had, to keep up a flume where the old one had stood. It appears from the pleading and proofs, that Norris continued to use the old flume to supply his mill from the time of the division in 1832, until after Ballard had erected his new mill in the fall of 1839, when Ballard cut away a portion of it, and appropriated the remaining portion for supplying his own mill. The defendant, Hill, admits in his answer upon information, the cutting away of the old flume by Ballard in the month of October, 1839, and charges that Norris prosecuted an action at law against Ballard for damages, which was settled, &c.; that he is informed that Norris claimed to have some right, either by custom or otherwise, of the precise character of which he is unadvised, to draw water from the dam through the east part of said flume. Ballard, also, in his direct testimony says, that at the time he contracted with Hill to sell the flouring mill and saw mill property, he told Hill that there was a difficulty with Norris about the flume; that he had cut it away, and Norris had sued him for doing so, and that Norris claimed a right to use water on that side of the stream. Here is strong evidence of actual notice to Hill of the existence of the old flume, and the use of it by Norris for supplying his grist mill at the time of the purchase from Ballard. But whether this be conclusive or not, Hill had knowledge, from the recorded deeds, of the right of Norris to use the water, and this was sufficient to put him upon inquiry as to the manner in which he had a right to convey it from the dam to his mill.

Having arrived at the foregoing conclusions as to the rights of the respective parties, holding the titles of Norris and McIntyre respectively, the next question is, whether the complainants have shown such a case as entitles them to the relief asked by the bill. One of the grounds upon which relief is prayed, is, that for the last two or three years the defendant has frequently, especially in times of low water, drawn upon the west side more than half the water of the river. If the charge in that behalf contained in the bill were *prima facie* sufficient, the testimony shows, at most, but an occasional or casual infringement of the complainants' rights, and is altogether too loose and unsatisfactory to justify this court in acting upon it, especially as it does not show any intention on the part of Hill, or those acting under him, to continue such infringement.

Another ground upon which relief is prayed is, that Hill, in violation of the rights of the complainants, has, ever since he became the owner of the mill erected by Ballard, kept up and maintained a flume from the dam to his mill, on and over the same land which was covered by the old flume connected with Norris' grist mill, to the exclusion of the complainants, and that he has used, and continues to use, more than one quarter of the water of the river. Admitting these charges to be true, and they seem to be established by the pleadings and proofs, it does not follow that the extraordinary powers of this court can be exerted to enjoin the defendant. "In regard to private nuisances, the interference of courts of equity, by way of injunction, is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits." See 2. Story's Eq. Jur. sec. 925; Fonb. Eq. by Jeremy, 49, 50, in notes.

The provision of the R. S., p. 505, conferring jurisdiction, in cases of nuisances, upon the chancery courts, was referred to in the argument; but that provision was not intended to enlarge or extend the jurisdiction of those courts. Upon which of the grounds above mentioned the interference of a court of chancery can be invoked in this case, it is not easy to perceive. Hill has been in the possession and use of his mill, using the land and the water in question for several years, and no suit at law or other litigation between these parties ever appears to have been instituted or had, nor is it at all apparent, or perhaps probable, that any litigation will be unavoidable to enable the complainants to secure and maintain their rights. Upon the ground of restraining irreparable mischief this case equally fails. The complainants do not appear to have made any actual attempt to use their water right on the west side of the river since Hill purchased his mill, nor to have provided any means of doing so. On the contrary, it appears that soon after Ballard cut away the flume in the fall of 1839, the valuable portions of the machinery were removed from the old mill, and the use of it as such was abandoned, since which time neither of the complainants has had any machinery on that side of the river, to be propelled by water. Until they have some use for the water power pertaining to that side of the stream, they cannot be injured by the use of it by Hill.

But it is insisted, on the part of the complainants, that the court of chancery has power to ascertain and determine, by decree, the rights of the respective parties to the use of the water, and to secure those rights by causing the water to be measured and guaged, so that each may draw his just share, and no more. This case, as made out by the proofs, does not seem to come within the principle of any of the cases cited in support of the jurisdiction. In the case of Belknap *v.* Trimble, 3 Paige, 577, the court held, that where different mill owners have a common right to an artificial use of water for their respective mills, the court of chancery has jurisdiction so to regulate the common use of the water, as to preserve the rights of each. In that case the complainants were the owners of mills, exercising their right, as far as the acts of the defendant did not prevent them, and the acts complained of were destructive of the complainants' business, and the court might properly interfere upon the ground of preventing immediate and irreparable mischief. No such ground is shown in this case, and it will be early enough to invoke the preventive power of a court of chancery, when the exigency happens which calls for its exercise.

There is another branch of this case, entirely distinct and separate from that which has been considered, and no way connected with it, except that it relates to the creation or sustaining of the water power. The complainants allege that they are the owners of two several parcels of land above the dam, partly flowed by the water raised by said dam, which Norris was compelled to purchase, in order to secure to the proprietors of the water power the right of flowing the same; and they pray that the defendants, or one or more of them, may be decreed to pay to complainants one-fourth of the sum paid by Norris for said lands, with interest, or to pay a yearly compensation in damages for the flowing of the same. No case has been cited where such a power has been exercised by a court of equity under circumstances like these. The case of Rogers *v.* McKenzie, 4 Vesey 752, was between the joint and separate estates of bankrupts, who were jointly and severally bound for a debt to the crown. That of Wright *v.* Hunter, 5 Vesey 792, and that of Sells *v.* Hubbell, 2 John. Ch. R. 394, were cases of contribution between the estates of copartners. If the court has power to decree payment by Hill of one-fourth of the purchase money, or the payment of damages resulting from the flowing, it would follow that the court could and ought to inquire into the relative amounts paid by any of the parties, or those under whom they claim, for all the lands flowed by the water raised by the dam; or the damage which each of them sustains by reason of the flowing of his land, so that each party might be placed upon an equality with the other in that respect. This is not asked by the bill.

A court of equity will not take jurisdiction of a matter which does not come within the principles of any adjudged case, nor any of the established principles upon which equity jurisdiction is based: and this seems to be a matter of that character. Certainly the principle of contribution has never been extended so far.

Norris, in order to entitle himself to any just right to complain, should at least have consulted his co-tenant, and given him an opportunity to take part in the negotiations for the purchase if he thought proper to do so. Suppose an action on the case had been brought by the owners of these parcels of land, against all the proprietors of the dam, and judgment recovered, and the whole collected out of Norris. Such judgment being for a tort, Norris could not have compelled a contribution, either in a court of law or of equity. Ellis *v.* Ellis, 2 Johns. Ch. R. 131.

From the view taken of the true construction of the partition deeds between Norris and McIntyre, and the rights of the parties holding their respective titles, it becomes unnecessary to decide several of the questions made on the argument, and which are not now noticed, although every question raised has been fully examined; but it may be hoped that the full exposition of the rights of the parties which has been attempted so far as became necessary in the decision of this case, will guide them in making such a just and amicable arrangement for the future protection and exercise of those rights, that no occasion may hereafter arise for an appeal to the remedial powers of a court of chancery.

The decree of the court of chancery in this case must be reversed, with costs.

Decree reversed.

McKibben v. Barton.

A creditor's bill filed after the return of an execution unsatisfied, to reach equitable assets and to set aside a fraudulent conveyance of real estate made by the debtor to a third person, cannot be sustained against the latter unless the creditor has obtained a lien on the real estate by a levy of his execution.

Appeal from Oakland Circuit Court in Chancery. McKibben, the appellant, and William Edwards, who died pending the suit, filed their bill in the circuit court against Hubbard, Mooney and the appellee Barton, to reach equitable assets belonging to Hubbard, against whom the complainants had a judgment, and to set aside as fraudulent a conveyance of real estate made by Hubbard to Mooney. The bill set out a judgment against Barton in favor of complainants, the taking out of execution, and the officer's return of the execution wholly unsatisfied, and contained all the usual allegations of an ordinary judgment creditor's bill under the statute. It also averred that certain real estate, described in the bill, had been conveyed by Hubbard to Mooney to defraud creditors, and that Mooney had afterwards, at the request of Hubbard, conveyed the same to Barton, the appellee, who was Hubbard's sister. Hubbard and the appellee Barton demurred to the bill. On the argument of the demurrer, the court below overruled it as to Hubbard, but allowed it as to Barton, and dismissed the bill as to her. From that part of the order allowing the demurrer and dismissing the bill as to Barton, McKibben, the surviving complainant, appealed.

Manning, for appellant.

Goodrich, for appellee.

By the court, Miles, J. There is undoubtedly a class of cases in which the aid of a court of equity may be invoked in behalf of a judgment creditor, where such aid is rendered necessary by the interposition by the defendant of some fraudulent or inequitable obstruction to the collection of the judgment, *independently of which the remedy would have been ample at law.*

In such case the party proceeds upon the ground that the defendant has property, either real or personal, liable to execution upon his judgment: but that by the obstruction interposed, such execution is prevented from having full effect.

The bill in this case contains the necessary allegation that the defendant has such property, and also a sufficient statement as to the fraudulent conveyances; but it is insisted that the complainant has not acquired a title to the land by the issuing and levy of an execution thereon before the filing of the bill.

Much learning has been expended in this case as to the meaning of this word *title.* I take it to mean no more than this, that the party has acquired a right to the property in dispute—a right to question the title of the fraudulent grantee—who holds by conveyances giving him a perfect title as against the grantor, but which may be avoided by a creditor.

In McElwain *v.* Willis, 9 Wendell 561, a leading case in New York on this subject, Nelson, J. says, "the jurisdiction of the court rests upon the right or title of the complainant acquired by the proceeding at law upon the judgment or execution." It will be remembered that in that state a judgment at law becomes a lien upon real estate from the time it is docketed, and that personal property liable to execution is holden from the time of the delivery of a writ of *fieri facias* to the sheriff. This doctrine seems to be well sustained by the authorities.

In the early case of Angel *v.* Draper, 1 Vernon, 399, a demurrer was sustained to a bill by a judgment creditor to reach the goods of his debtor in the hands of a fraudulent assignee, for the reason that the plaintiff ought actually to have sued out a *fieri facias* before he filed his bill. Shirley *v.* Watt, 3 Atk. 200, was a bill to redeem a leasehold estate: held, that until execution the plaintiff had no lien on the estate, and the bill was for that reason dismissed.

These two English cases are referred to in Wiggins *v.* Armstrong, 2 John. Ch. R. 144. Chancellor Kent there states, "the reason of the rule seems to be, that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights. *Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds.*" See, also, 1 Dev. Eq. R. 107.

The law upon this subject is so well settled and so clearly expressed in the opinion of Chancellor Walworth, in the case of Beck *v.* Burdett, 1 Paige 308, that I use his words as better than any language of my own. He says: "There are two classes of cases where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case, the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant which cannot be reached by execution at law."

It will be observed that in that case it was personal property that was alleged to have been fraudulently assigned, and that is why the chancellor speaks of the lien having been obtained by the issuing of an execution. It is true he speaks of an actual levy being necessary to enable the plaintiff to hold the property against other execution creditors, or bona fide purchasers: but this is founded upon the language of their statute, exempting such persons from the effect of the lien created by the mere delivery of the *fi. fa.* to the sheriff.

The chancellor refers to Angel *v.* Draper, and Shirley *v.* Watts, as being cases of the description first mentioned, and to McDermutt *v.* Strong, 4 John. Ch. R. 687, as one of the latter class—for the reason that in that cause the interest of the judgment debtor was not a proper subject of seizure and sale upon execution, and that in such case the actual return of the execution unsatisfied, is necessary to give the court of chancery jurisdiction to decree satisfaction out of the equitable property of the defendant.

In such case it is also held, upon the authority of Edgell *v.* Haywood, 3 Atk. 357, that it is the filing of the bill after the return of the execution at law, which gives the plaintiff the specific lien. In this state no lien is acquired at law upon real estate, until the actual levy of an execution.

The complainant in this case, therefore, had not acquired such a right to the real estate conveyed to Barton as to entitle him to be aided in enforcing his execution at law upon the judgment. He does not show that if he could successfully dispute the title of Barton he would be entitled to the benefit of the decree of this court. But it is insisted this is a good creditor's bill under the statute.

Had the defendant Hubbard retained any equitable interest in the land, such interest would be the proper subject of a creditor's bill; and if there was no fraud, the grantee would be an unnecessary party to the bill, as the complainant, by the decree of the court, would be subrogated to all the rights of the defendant, including the right to call upon the trustee in the same manner as the defendant himself might have done. Edmeston *v.* Lyde, 1 Paige 637.

But where no rights remain to the debtor, none could by the decree be transferred to the plaintiff, and his bill would be entirely ineffectual for that purpose. *Id.*

The complainant cannot reach this property as equitable assets in the hands of Barton. The conveyance being fraudulent as to him, *he* has a right to treat the property as though it had never been made, and only needs the assistance of this court to remove the cloud thrown over the title, to have satisfaction under his execution at law; but he is not entitled to that assistance until he places himself in a position to ask it.

It follows, that the decree in chancery must be affirmed.

Decree affirmed.

PEOPLE *v.* RICHARDS AND PELTON.

An indictment lies for a conspiracy to cheat an individual of *real* estate, as well as of personal property.

A conspiracy to commit a felony, when executed, is merged in the felony; but a conspiracy to commit a misdemeanor is not merged in the misdemeanor.

In an indictment for a conspiracy, the agreement or combination must be set out, but the means to be used in executing the conspiracy need not be set forth in the indictment, unless they are a component part of the offence, as where the combination and the object to be attained are not in themselves unlawful, but the means to be used, to effect the object, are unlawful.

An indictment for a conspiracy to cheat an individual of his lands and goods, need not state the means by which it was to be accomplished.

In conspiracy, the offence consists in the unlawful agreement, and not in the acts that follow it.

Case reserved from Hillsdale Circuit Court. Indictment for a conspiracy. The defendants were tried and convicted in the circuit court, and the questions reserved were as to the sufficiency of the indictment, which contained three counts. The first count charged that defendants, on the tenth day of November, in the year eighteen hundred and forty three, with force and arms, at Somerset, in the county of Hillsdale, unlawfully and wickedly did conspire, combine, confederate and agree together to cheat and defraud Laton Hoxie of his lands and tenements, and of his moneys, goods and chattels, he the said Laton Hoxie being a man of weak mind and intellect; and that they, the said William P. Richards and Nathan Pelton, in pursuance of the said conspiracy, combination and agreement so as aforesaid entered into by them then and there, to wit, on the said tenth day of November, at Somerset aforesaid, did falsely pretend that one Thomas Farmer was about to institute a criminal prosecution against him the said Laton Hoxie, upon a charge that he the said Laton Hoxie had attempted to commit a rape upon the body of one Sophronia Farmer; and did then and there represent to and persuade him the said Laton Hoxie, that by the testimony of the said Sophronia Farmer he would be convicted of such offence, and imprisoned in the state prison of this state for a long period of time, to wit, for twenty years, and that he must leave the state of Michigan: and did then and there, in pursuance of said conspiracy, combination and agreement, persuade and induce him the said Laton Hoxie to execute and deliver to the said William P. Richards a deed whereby was conveyed to said Richards and his heirs a certain piece or parcel of land situate in said county of Hillsdale, containing many acres, to wit, one hundred and twenty acres, of great value, to wit, of the value of two thousand dollars, of the property of him the said Laton Hoxie, without paying to him the said Laton Hoxie any valuable consideration therefor: and did then and there, in pursuance of said conspiracy, persuade and induce him the said Laton Hoxie to execute and deliver to the said Nathan Pelton a power of attorney, constituting the said Nathan Pelton his attorney to collect and receive all debts due and owing to the said Laton Hoxie, there being then due and owing to the said Laton Hoxie many debts, amounting in the whole to a large sum of money, to wit, the sum of five hundred dollars: and did then and there, in pursuance of said conspiracy, combination and agreement, persuade and induce the said Laton Hoxie to part with and deliver up possession to the said Nathan Pelton of the said lands and premises, together with divers articles of personal preperty of great value, to wit, of the value of five hundred dollars, of and belonging to him the said Laton Hoxie, without paying him the said Laton Hoxie any consideration whatever therefor, and with the intent to cheat and defraud him the said Laton Hoxie of his lands, goods, money and chattels, &c.

The second count stated that defendants afterwards, to wit, on the said tenth day of November, in the year aforesaid, with force and arms, at Somerset aforesaid, unlawfully, fraudulently and deceitfully did conspire, combine, confederate and agree together to cheat and defraud the said Laton Hoxie of his lands, tenements, goods and chattels; and that the said William P. Richards and Nathan Pelton, in pursuance of said conspiracy, combination and agreement so as aforesaid entered into by them, then and there did falsely pretend that one Thomas Farmer would prosecute him the said Laton Hoxie upon a charge that he the said Laton Hoxie had attempted to force, abuse and commit a rape upon an infant daughter of the said Thomas Farmer, and cause him the said Laton Hoxie to suspect and believe that he the said Thomas Farmer would prosecute him the said Laton Hoxie upon said pretended charge, he the said Laton Hoxie being a man of weak mind and intellect: and did then and there, in pursuance of said conspiracy, combination and agreement, represent to and persuade him the said Laton Hoxie that, upon the testimony of the said infant daughter of said Thomas Farmer, he would be convicted of said offence; (they the said William P. Richards and Nathan Pelton well knowing that the said Thomas Farmer would not prosecute the said Laton Hoxie on said pretended charge): and did then and there, in pursuance of said conspiracy, combination and agreement, persuade and induce him the said Laton Hoxie to part with, convey and deliver to them the said William P. Richards and Nathan Pelton his lands, tenements, goods and chattels, without receiving therefor any valuable consideration, the said lands, tenements, goods and chattels being of great value, to wit, of the value of three thousand dollars; and did then and there, in pursuance of said conspiracy, combination and agreement, obtain from and receive of him the said Laton Hoxie his lands, tenements, goods and chattels without paying him therefor any valuable consideration, with the intent and for the purpose of cheating and defrauding him the said Laton Hoxie of his lands, tenements, goods and chattels, to the great damage, &c.

The third count was as follows: And the jurors aforesaid, upon their oaths aforesaid, do further present that the said William P. Richards and Nathan Pelton afterwards, to wit, on the same day and year aforesaid, with force and arms, at Somerset aforesaid, unlawfully, fraudulently and deceitfully, did conspire, combine, confederate and agree together to cheat and defraud the said Laton Hoxie of his lands, tenements, goods and chattels, to the great damage of the said Laton Hoxie, to the evil example of all others, and against the peace and dignity of the people of the state of Michigan.

Howell, for the people,

Backus, for defendants.

By the court, WING, J. The counsel for the defendants insists that cases of indictable conspiracies at common law are classed under two heads; either there must be a charge of a conspiracy to commit a *criminal act*, or to commit an act not criminal by criminal *means*. That in the one case the offence is to be determined by the nature of the *object*, in the other by the nature of the *means*.

This question was elaborately argued by senators Spencer and Stebbins, the first giving the judgment of the majority, and the latter of the minority of the court of errors in New York, in the case of The People v. Lambert, 9 Cowen 578. The charge set forth in the indictment in that case was in substance that the defendants conspired, by wrongful and unjust means, to cheat the Sun Fire Insurance Company and other persons of their goods and chattels; and that in the execution of said conspiracy and in pursuance thereof, and by certain indirect and undue means, did cheat and defraud the said company of their goods, chattels and effects—describing them—and thereby impoverished and injured the company, &c.

The supreme court sustained the indictment, but their judgment was reversed by the court of errors. There were many points made and decided in that case, some of which are raised in this case. Upon a careful examination of the arguments of the court and the senators, we are constrained to adopt the views of the supreme court and the minority of the senate, as being sustained by the common law decisions.

In Arch. Crim. Pl. 507, the author says a conspiracy is an agreement between two or more persons: 1. Falsely to charge another with a crime punishable by law—either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him. 2. Wrongfully to injure or prejudice a third person or any body of men in any other manner. 3. To commit an offence punishable by law. 4. To do an act with an intent to pervert the course of justice, &c. 3 Chitty's Crim. L. 1139; 1 Hawk. P. C. b. 1, ch. 72, sec. 2, support the same doctrine. In the second class we have an authority for an indictment for a conspiracy to cheat an individual. See 7 Am. Jurist 445. It is said, however, that an indictment will not lie for a conspiracy to commit any mere civil trespass. Arch. Crim. Pl. 507.

Mr. Chitty, at the page cited above, says, "there are perhaps few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal; certain it is, that there are many cases in which the act itself would not be cognizable by law if done by a single person, which becomes the subject of indictment when affected by several with a joint design." He further remarks, "it might be inferred from the decisions that, to constitute a conspiracy, it is not necessary that the act intended should be in itself illegal, or even immoral—that it should affect the public at large, or that it should be accomplished by false pretences; and, though it is agreed that the gist of the offence is the union of persons, it is impossible to conceive a combination, as such, to be illegal. We can rest, therefore, only on the individual cases decided, which depend in general upon particular circumstances, and which are not to be extended."

The counsel for defendants in this case cites the last sentence of the last quotation, which is taken from the remarks of Lord Ellenborough in the case of King *v.* Turner, 13 East. 231, to show that even if an indictment for a conspiracy to commit a fraud upon an individual will lie, yet it cannot lie where the object of the conspiracy is to defraud him of his lands; and the indictment being bad as to land, is bad as to all. In the case cited, the indictment was for a conspiracy to commit a civil trespass, by going on to another person's land to kill hares. It was held the indictment would not lie, and Lord Ellenborough's remark was made in reference to such a case. The judge cannot be supposed to have intended to say that an indictment for a conspiracy to cheat an individual would only lie in cases where the facts were the same as those in which indictments had been sustained. He only objects to the extension of the doctrine to cases where the principles laid down in former cases were not involved.

By reference to the cases, I am unable to perceive that they depend upon the kind of property to obtain which was the object of the conspiracy. In this, as in many of the cases, the intended fraud or cheat gives character to the transaction, and not the nature of the property. It is true, that fraud in relation to real estate resolves itself into some other distinct offence when consummated; but the same may be said of all kinds of property. We do not pretend to lay down a rule which shall govern in this class of cases—we only say, that from an examination of the cases cited by the elementary writers, we are of the opinion that this case falls within the general principles deducible from those cases.

It is insisted that the first two counts are bad, because they charge an executed conspiracy to cheat by false pretences, which is a higher crime than a conspiracy at common law.

The objection is founded upon another, made in this cause, that an indictment will only lie for a conspiracy to commit a crime, or to do a lawful act by criminal means; but the English authorities and the decisions in Maryland and other states establish, as we think, and as we have said, a contrary doctrine: and if a conspiracy may be indictable, although the act to be done, if done by an individual, or the means made use of would not be indictable, it would follow from the position of the defendant's counsel, that a conspiracy which is a misdemeanor may be merged in acts which of themselves do not amount to a misdemeanor, or acts which in themselves amount only to a misdemeanor, an offence of the same grade with the conspiracy; and the consequence might also be that a conspiracy might be indictable if not executed, which, if executed, would not be indictable.

It was said in an early case in Massachusetts, Commonwealth v. Kingsbury, 5 Mass. 106, that where the misdemeanor or felony is actually executed, the conspiracy is merged and cannot be punished. But the case was one of a conspiracy to commit a distinct felony. It is no doubt the law, that if the felony is proved the couspiracy must at once merge. To apply such a rule to misdemeanors, is scarcely in accordance with legal analogy, and it is supported by no other authority. That it never obtained in England to such an extent as to involve the absorption of a conspiracy to commit a misdemeanor in the misdemeanor itself, is evident from the elementary treatises, in which no such doctrine is even broached, and the books of precedents, in which forms constantly occur for conspiracies to commit misdemeanors to which the overt act is attached. See 15 Maine R. 100; 7 Serg. & Raw. 469. This subject was fully discussed in New York, in the case of The People v. Mather. Justice Marcy says, in delivering the opinion of the court: "It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so when the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor, it cannot be merged. Where two crimes are of equal grade there can be no legal, technical merger." 4 Wendell 265.

But we are disposed to go no farther than is necessary to decide this case, and if our views as expressed above are not correct, still the question made by the defendant's counsel may be disposed of on another ground.

Does it appear by the indictment in this case, as in the case in 5 Mass., that an offence of a higher grade than a conspiracy has been committed? Would the acts set forth as having been done in pursuance of the conspiracy, if true, make defendants guilty of a *cheat*, or of obtaining goods or property of any kind by *false pretences*, or of having *obtained the signature to any written instrument?* I think not. Neither of the counts charge, as is supposed by defendants' counsel, a conspiracy to cheat by false pretences. The means by which the conspiracy was to be accomplished, formed no part of the conspiracy. They are set forth in the indictment as acts done in pursuance or in furtherance of the conspiracy. The acts charged as done, were, that one Thomas Farmer was about to prosecute—to charge Hoxie with an attempt to commit a rape upon Farmer's daughter; that by the testimony of the daughter he would be convicted and sent to the state prison, and he must leave the state. This is the substance of the pretences. In the class of cases stated, the tokens must be false, and the pretences must be of some existing fact, and must be made for the purpose of inducing the prosecutor to part with his property, and it must appear that the object was effected by such means as are stated; but this does not appear in this case. The pretence that a person would do an act which he did not mean to do, as a pretence that he would pay for goods on delivery, is not a false pretence within the act, but merely a promise for future conduct. Arch. Crim. Pl. 246; 4 City Hall Recorder 156; Roscoe's Crim. Ev. (2d edit.) 422; 1 Carrington & Payne 661; 3 T. R. 98.

Our statute is taken from the English statutes, and the decisions upon the latter are applicable to cases arising under the former.

If I am correct in this view of the subject, it will obviate the necessity of further discussing the doctrine of merger. The charges are not of existing facts: but of things which a third person has threatened to do—upon which no indictment can be predicated. The forms in 3 Chitty's Crim. L. 1185, 1186, are examples of indictments for executed conspiracies.

Again, it is objected that the indictment charges that the defendants induced and persuaded Hoxie to make his deed, but does not set forth the means. This objection is also in part predicated upon the erroneous assumption that the object to be accomplished must be a crime, or the means must be criminal. The objection may also be based upon the general rule, that in all indictments the offence must be so set forth as to enable the court to judge whether an offence requiring the defendant to plead is stated upon the record.

The agreement or combination must be set out. The crime does not consist in the mere combination: but where to this is added an illegal object, then it becomes criminal; and where neither the conspiracy nor the object to be attained is unlawful, but the means by which it is to be executed are criminal, then it is necessary to set out the means intended to be used, as a component part of the offence.

In every case that can be adduced of a conspiracy, the offence depends upon the unlawful agreement, and not on the act which follows it; the latter is but the evidence of the former. 2 Russel 568; 2 Mass. 537; 2 Burr. 993; 3 *id.* 1321. In 3 Chitty's Crim. L. 1141, it is said, that to render the offence complete, there is no occasion that any act should be done in pursuance of the unlawful agreement entered into between the parties; still less can it be necessary to show that any party was actually defrauded; for the conspiracy is the essence of the charge, and, if that be proved, the defendant will be convicted.

It is usual to set out the overt acts, such as may have been done by any one or more of the conspirators in order to affect the common purpose of the conspiracy, but this is not essentially necessary. Rex *v.* Gill, 2 Barn. and Ald. 204; 2 Burr. 993; 3 *id.* 1321; Starkie's Crim. Pl. 170-1; 4 Wendell 264.

What we have said disposes of another point made by defendants' counsel, viz: That the third count of the indictment is bad, as being too general. The forms given in 3 Chitty's Crim. L. 1185, embrace the general count contained in this indictment. It states the object and the intent. 3 Chitty's Crim. L. 1143.

Thus we understand the common law to be upon all these points. In the case of the People *v.* Lambert, it was strongly urged by Senator Spencer, that unless the means by which the fraud was effected were set out in the indictment, the defendant would have no means of knowing for what he was to be tried, until the moment when the public prosecutor opens his testimony on the trial; that it opens the way to general and indefinite charges; that such an indictment ought not to be sustained in a country which regards every citizen as composing a part of its sovereignty. But the reply of Senator Stebbins is unanswerable. Referring to Chitty and Russel, he says, these authorities are quite sufficient to establish the proposition that the offence consists in the act of combining unlawfully; that where the object is unlawful the offence is complete, whether the means of execution were agreed upon or not; that it is not requisite those means should form any part of the agreement, unless the agreement is thereby rendered unlawful. If, then, a confederacy to do an unlawful act, although no means be agreed upon, is indictable, it follows, that in an indictment for such an offence, where the means were agreed upon, it would be unnecessary to state them, because they form no part of the offence; it is complete without them. In the one case the means could not be set out; in the other it would as certainly be unnecessary.

The question whether the common law should be altered by statutory provision, restricting indictments for conspiracy to defraud an individual, to cases where the object is to commit an offence, or where the means are criminal, as has been done in New York, must be determined elsewhere.

Certified accordingly.

LAWSON ET AL. *v.* HIGGINS ET AL.

Chap. 122, R. S., does not give a lien for means and supplies furnished, or for money advanced, in the building, fitting and furnishing of a vessel. The lien in such case is restricted to work done and *materials* furnished.

CASE reserved from Wayne Circuit Court.

Abbott, for plaintiffs.

Van Dyke and Emmons, for defendants.

By the court, WHIPPLE, C. J. The questions arising in this case were reserved by the presiding judge of the Wayne circuit, for the opinion of this court.

The action is brought upon a bond given pursuant to the thirteenth section of chapter 122, title 26, Revised Statutes of 1846, which chapter provides the mode of proceeding "for the collection of demands against ships, boats and vessels."

To the declaration (which was filed as the commencement of the suit), the defendants interposed a demurrer. In support of the demurrer, it is contended that the plaintiffs' demand, as set out in the declaration, was not a lien on the boat. Whether this ground is well taken, must depend upon the construction of the first subdivision of section 1, which provides, that "every ship, boat or vessel used in navigating the waters of this state, shall be subject to a lien thereon: 1. For all debts contracted by the master, owner, agent or consignee thereof, on account titled to the benefit of the decree of this court. But it is insisted this is a good creditor's bill under the statute.

Had the defendant Hubbard retained any equitable interest in the land, such interest would be the proper subject of a creditor's bill; and if there was no fraud, the grantee would be an unnecessary party to the bill, as the complainant, by the decree of the court, would be subrogated to all the rights of the defendant, including the right to call upon the trustee in the same manner as the defendant himself might have done. Edmeston *v.* Lyde, 1 Paige 637.

But where no rights remain to the debtor, none could by the decree be transferred to the plaintiff, and his bill would be entirely ineffectual for that purpose. *Id.*

The complainant cannot reach this property as equitable assets in the hands of Barton. The conveyance being fraudulent as to him, *he* has a right to treat the property as though it had never been made, and only needs the assistance of this court to remove the cloud thrown over the title, to have satisfaction under his execution at law; but he is not entitled to that assistance until he places himself in a position to ask it.

It follows, that the decree in chancery must be affirmed.

Decree affirmed.

PEOPLE *v.* RICHARDS AND PELTON.

An indictment lies for a conspiracy to cheat an individual of *real* estate, as well as of personal property.

A conspiracy to commit a felony, when executed, is merged in the felony; but a conspiracy to commit a misdemeanor is not merged in the misdemeanor.

In an indictment for a conspiracy, the agreement or combination must be set out, but the means to be used in executing the conspiracy need not be set forth in the indictment, unless they are a component part of the offence, as where the combination and the object to be attained are not in themselves unlawful, but the means to be used, to effect the object, are unlawful.

An indictment for a conspiracy to cheat an individual of his lands and goods, need not state the means by which it was to be accomplished.

In conspiracy, the offence consists in the unlawful agreement, and not in the acts that follow it.

Case reserved from Hillsdale Circuit Court. Indictment for a conspiracy. The defendants were tried and convicted in the circuit court, and the questions reserved were as to the sufficiency of the indictment, which contained three counts. The first count charged that defendants, on the tenth day of November, in the year eighteen hundred and forty three, with force and arms, at Somerset, in the county of Hillsdale, unlawfully and wickedly did conspire, combine, confederate and agree together to cheat and defraud Laton Hoxie of his lands and tenements, and of his moneys, goods and chattels, he the said Laton Hoxie being a man of weak mind and intellect; and that they, the said William P. Richards and Nathan Pelton, in pursuance of the said conspiracy, combination and agreement so as aforesaid entered into by them then and there, to wit, on the said tenth day of November, at Somerset aforesaid, did falsely pretend that one Thomas Farmer was about to institute a criminal prosecution against him the said Laton Hoxie, upon a charge that he the said Laton Hoxie had attempted to commit a rape upon the body of one Sophronia Farmer; and did then and there represent to and persuade him the said Laton Hoxie, that by the testimony of the said Sophronia Farmer he would be convicted of such offence, and imprisoned in the state prison of this state for a long period of time, to wit, for twenty years, and that he must leave the state of Michigan: and did then and there, in pursuance of said conspiracy, combination and agreement, persuade and induce him the said Laton Hoxie to execute and deliver to the said William P. Richards a deed whereby was conveyed to said Richards and his heirs a certain piece or parcel of land situate in said county of Hillsdale, containing many acres, to wit, one hundred and twenty acres, of great value, to wit, of the value of two thousand dollars, of the property of him the said Laton Hoxie, without paying to him the said Laton Hoxie any valuable consideration therefor: and did then and there, in pursuance of said conspiracy, persuade and induce him the said Laton Hoxie to execute and deliver to the said Nathan Pelton a power of attorney, constituting the said Nathan Pelton his attorney to collect and receive all debts due the judgment, offered in evidence the journal entry of the judgment, the calendar entries in the cause, and a taxed bill of costs, which were objected to by defendant, but admitted by the court. Defendant also insisted the circuit court had not jurisdiction of the former cause, for reasons it is unnecessary to state here, as they appear in the opinion of the court. Exceptions were taken to the ruling of the court, and, judgment having been rendered in favor of McHenry, Norvell removed the cause to this court by writ of error,

Davidson, for plaintiff, in error.

Bishop, for defendant, in error.

By the Court, Miles, J. The first error assigned is, that the plaintiff below was permitted to give in evidence upon the trial, the journal entry of the circuit court for the county of Wayne, of a judgment obtained in his favor by default, for want of a plea, and upon assessment of his damages by the clerk, for the damages so assessed "and costs of suit;" and also an original bill of costs taxed in the cause, and the calendar entries of the proceedings therein. To the whole of this evidence the defendant below objected, but the objection was overruled. The proposition asserted by the plaintiff here is, that this being an action of debt upon a record of the same court in which the suit was commenced, and the issue being *record* or *no record*, the party must prove his case by a proper and legal original record, *made up pursuant to the statute.*

This cause was tried on the 16th day of May, 1848. Previous to the adoption of the revision of the laws of 1846, there had for a long time existed a statutory provision, that whenever any civil cause should be finally determined, the clerk should in the next vacation enter the warrants of attorney, writ, process, pleadings, proceedings and judgment, so as to make a complete record thereof, in a book to be provided for the purpose.

This provision was first adopted in the general act defining the jurisdiction and powers, and directing the pleadings and practice of the supreme and county courts of the territory of Michigan. Laws adopted by the Governor and Judges, 316, sec. 14; Laws 1827, p. 124, sec. 24; R. S. 1838, p. 410, sec. 10.

In 1840, the Revised Statutes of 1838 were modified by requiring and allowing the clerk to make up a record only in case the same was required to be done by a party. Ses. L. 1840, p. 183.

The Revision of 1846 contains no provision on the subject; so that at the time of the trial there was no statute requiring or allowing a record to be so made.

What, then, constituted the record proper to be given in evidence in this case?

There is another statutory enactment which had its origin at the same period, from which we date the one just referred to, and which still continues upon our statute book. This provision was originally in these words: "For preventing errors in entering the judgments, orders and decrees of the supreme, circuit and county courts, the judges and justices of the said courts respectively, before every adjournment, shall cause the minutes of their proceedings during the preceding day to be publicly read by the clerk, and corrected when necessary, and then the same shall be signed by the presiding judge of said court: which minutes, so signed, shall be taken in a book and carefully preserved *among the records*." This provision is in the general act before referred to, and has been continued in substantially the same terms to the present day.

This mode of perpetuating judicial proceedings is the only one now existing, and by the repeal of the statute seems to have been the only one intended. Have we not, by our system of jurisprudence, adopted this mode instead of the common law mode? And if so, does it not possess the same intrinsic force as evidence?

This section of our statute is copied *verbatim* from that of Ohio, and it may be useful to look at some of the cases decided in that state in which this question has arisen. The first case is Harvey *v.* Brown, 1 Ohio 129. There the journal entry of judgment was imperfect, containing only the words "judgment &c.," and was so signed by the judge. The record, made up in pursuance to a statute similar in its provisions to our former statute, was perfect, and a transcript was returned upon writ of error, together with a copy of the defective entry. The court refused to allow the plaintiff in error to assign errors upon the journal entry, for the reason that the writ of error must be returned with a transcript of the record required by the statute. The court took that occasion to declare their opiniun that the correct course was to make the entries in the daily minutes of the court with the same technical precision as is required in the complete record made up in vacation. It may be said of this case, that the distinction taken by the court between the minutes of the court and the record required by the statute, is founded upon that statute.

In Young *v.* Buckingham, 5 Ohio 488, an objection was taken to the introduction of the minutes of the court of common pleas as evidence, because no complete record had been made. The statute in that state relative to laying out and establishing roads, requires the commissioners to cause the report, survey and plat to be recorded, and declares, that from thenceforth the road shall be considered a public highway: and the court were called upon to determine the question, whether the original report with the minutes of the commissioners were admissable evidence to show the establishment of a road, or whether the record made the public highway. The court say, the minutes form no part of the record, but contain the materials from which the record is to be made, and that all being done to authorize the recording officer to record, it should in law be considered as recorded, though the manual labor of recording in the book had not been performed.

This principle was also asserted in 4 Ohio 83. In The State *v.* Dawson & Tracy, 6 Ohio 110, the action was debt upon a recognizance. The plea was *nul tiel* record, and one question raised was, whether the recognizance taken in open court was a record. The court say, that the orders and decrees and the minutes of the proceedings of the court of common pleas, in those cases in which *no final record is made*, or is required to be made, are legal evidence and matter of record, if the court was in the exercise of its legitimate power and authority, and that the recognizance being a proceeding of the court authorized by law, required to be journalized and actually entered in the minutes of a court of record, is a matter of record on which a *scire facias* would lie.

Although the journal is open to correction during the whole of the term in which the entries are made, yet no amendment, except in mere matter of form, can be made, at a subsequent term. Torbet *v.* Coffin, 6 Ohio 34 and 80. Clerical errors of the clerk and none others, can be amended in criminal cases. *Id.* 435. In the case of Harvey *v.* Brown, and that of The State *v.* Dawson & Tracey, the question arose directly upon a plea of *nul tiel* record; in the others referred to, it came up collaterally. From an examination of these cases, we may safely infer that, but for the statute requiring a record to be made by transcribing the files and the necessary journal entries, those files and entries would be held a substitute for the common law record, and treated as such.

In Pennsylvania, the docket entries, as they are called, are treated as the original record. 14 Serg. & Raw. 156. In Undergraff v. Perry, 4 Penn. State Rep. 292, is a form of a docket entry of a judgment confessed upon a note and warrant of attorney. It is in very brief terms, and contains little of the formality of a common law record.

In New York, the proceedings in a cause are contained in the files and minutes of the court, until after the rule for judgment becomes absolute, when a formal record is made up by the attorney for the successful party; and though made after the cause is finally determined, yet, in imitation of the common law record, the entries appear to have been made from time to time, as the cause was progressing. Until this record is signed by the proper officer and filed, no execution can be had upon the judgment.

Our practice is different, and may be said to be nearer the ancient practice at common law. After issue is joined, or default is due, when the cause comes under the immediate notice of the court, all proceedings are had in open court, and are entered in a formal manner upon a daily journal of its proceedings; which is read over, corrected if necessary, and signed by the judge who holds the court.

If any issue of fact is tried by a jury, their verdict is entered upon the record, in a form almost identical with that at common law. So of the judgment, which is perfect as soon as signed, and the party recovering may proceed immediately to tax his costs, and after a lapse of twenty four hours from signing the judgment, is entitled to execution. These entries do not, however, contain a perfect history of all the material proceedings in a cause. For the evidence of the steps taken in the cause anterior to the issue or the default, we must look to the files of the court. The process and pleadings are all required to be filed, though not to be transcribed.

In the case in 13 Conn. R. 213, referred to by the plaintiff's counsel, the writ and declaration on file are treated as a part of the record;

the objection was, that the brief minutes of the justice, of what transpired after the return of the process, were not sufficient in form to constitute a record.

I am aware of the objection to this mode of preserving a record, and the danger from loss or abstraction of the files, and could well hope that some other more desirable mode should be provided by the legislature. But with the policy of the modification of the statute, and of its final repeal, either on account of its abuse, in increasing the expenses of a suit, or for any other reason, we have nothing to do. Our duty is begun and ended when we shall have answered the inquiry proposed to ourselves, What now constitutes a judgment record in this state?

In view, then, of the system established by our statutes, and the practice of our courts, we think the only rational and safe conclusion is, that a common law record is not necessary; and in the absence of any statute, and where no record has been made while it existed, the files and journal entries before referred to are to be deemed a substitute for such record, and to constitute the record itself.

Upon the argument, it was suggested a difficulty would exist in exemplifying such a record. I confess I cannot discover any, so long as the record exists. All the necessary papers and entries are in the office of the clerk of the same court in which the suit was prosecuted from its commencement to its conclusion, and can be as easily transcribed for this purpose as they could be for the purpose of making up the record formerly required by the statute.

One object of a transcript by way of record would be to guard against loss by multiplying copies; and its necessity was apparent in this case, where, from loss of the files, a resort to the calendar entries became necessary to show the steps taken in the case before judgment.

It appeared from the evidence thus produced, that the original suit in which the judgment was recovered, was commenced by declaration; and it was insisted upon the trial, that the circuit court never acquired jurisdiction of the person of the defendant in that suit, and that the proceeding was therefore void. This objection is based upon the ground, *first*, that rule 11 of the circuit court, requiring the defendant to plead within thirty days after service of the declaration, was never in fact adopted, and if adopted, that it was in conflict with the statute; and, secondly, that the affidavit of service of the copy of declaration and notice of rule to plead, was defective in not stating the time when and the place where the same were served, and that the authority of the officer taking the same did not appear. It appeared the declaration was filed on the 28th day of June; that default for want of a plea was afterwards entered; and that judgment was perfected at the November term following.

It may have been the intention of the legislature to put this mode of beginning suits upon the same footing with that of commencing by original writs; and if we were now for the first time to give a construction to the act, we might so hold. But it may be said, the statute contemplates the action of the court in fixing the time to plead, by rule; and such seems to have been the view taken of it by this court, in adopting rule 11, in 1839, which provided specially that, in suits thus commenced, the defendant should have the same time to plead subsequent to the next succeeding term after filing the declaration, as is provided by the rule next preceding, in cases commenced by original writs.

Rule No. 11, of 1843, is a mere amendment of that of 1839, substituting thirty days after service, instead of ninety days after the first day of the next succeeding term. The length of time is the only difference; and the court having construed the statute as giving them the power to make the first rule, must necessarily be authorized to make the latter. This amended rule was published in the new edition of the rules of 1843, with the additional rules then adopted. The omission by the clerk to record the amendment furnishes very slight evidence that it was not adopted, when opposed by the long acquiescence of the court and bar in the correctness of the amendment as published.

The affidavit of service of declaration, &c., which was given in evidence by the defendant below, was sworn to, as appears from the jurat, on the 31st day of July, 1844, and states the service to have been made "on the 28th day of June *last past.*"

Here the jurat is an essential part of the affidavit, as without it the fact of the time of service would be unintelligible. 4 Wendell 283. Taken together, they show *when* the service was made. The affidavit was taken in a cause in the circuit court for the county of Wayne, and before the deputy clerk. The court will take notice of its own officers; otherwise where the officer is of another court, or a commissioner. 3 Caines' R. 128.

The statute requires a personal service, but does not state *where* the service shall be made. It may be made by the sheriff: in such case his return must show a compliance with the statute in making a personal service; and I apprehend, if a return to that effect is made by him, the legal intendment must be, that he properly discharged his duty by making service within his county.

The statute authorizing service to be made by any disinterested and credible person, must be construed as giving to such person powers equal at least to those possessed by the sheriff for the same purpose. In the one case the evidence of service is contained in the official return of the officer; in the other, an affidavit is required, and such affidavit of personal service must be deemed sufficient to entitle the court to proceed as in case of the return of a summons. Rev. Stat. 1838, p. 419, sec. 10.

Upon filing this affidavit, the statute requires the clerk to enter the defendant's appearance. If this is neglected, it is a mere matter of form, which may be amended by an order *nunc pro tunc*.

There being, then, no error found in the record or proceedings of the circuit court, the judgment must be affirmed.

Judgment affirmed.

FINDLEY v. THE PEOPLE.

A plea in abatement to an indicment, that states several distinct facts having no relation to, or dependence upon each other, is bad for duplicity.

A plea in abatement should be certain to every intent, and conclude by praying judgment of the indictment and that it may be quashed, and must be verified by affidavit.

Where the grand jury have finished their business and been dismissed before the adjournment of the court without day, they may be re-summoned at any time during the term, to inquire into an offence committed subsequently to their discharge; and grand jurors who were originally summoned, but did not appear and act with their fellows before they were dismissed, may be re-summoned, and on appearing and being sworn and empanneled, may act with them on their second convocation.

A grand juror who appears after the jury have been sworn and received the charge of the court, may or may not be sworn, in the discretion of the court, where there are enough grand jurors without him.

It is not error for the court, after the jury have retired to consult of their verdict, to permit them, on their request, to have the Revised Statutes in their room, although the same is objected to by the prisoner's counsel.

ERROR to Oakland Circuit Court. Indictment for murder.

T. J. Drake, for Findley.

Stevens, prosecuting attorney, for the People.

By the court, MUNDY, J. On the 8th of January, 1848, it being an adjourned day of the September term, 1847, of the circuit court for the county of Oakland, Findley, the plaintiff in error, was indicted for the murder of Simpson Buck. Upon his arraignment, he pleaded not guilty; but was afterwards permitted by the court to withdraw that plea; whereupon he put in the following plea in abatement: "And the said John Findley comes, &c., and says, that the said bill of indictment ought not to be had, or further prosecuted against the said John Findley, because the said bill of indictment was not found by the grand jury inquiring in and for the body of the county of Oakland, at the September term of the circuit court for said county, in the year A. D. 1847; but that the said bill of indictment was found by a body of men claiming to be the grand jurors of the people of the state of Michigan, inquiring in and for the body of the said county, on the 8th day of January, A. D. 1848; and that on the said 8th day of January, A. D. 1848, after the said body of men were sworn and charged by the court, and were retiring, one Henry Barber, who was of and belonged to the grand jurors of the people of the state of Michigan, inquiring in and for the body of the county of Oakland aforesaid, appeared in said circuit court and desired to be assembled and convened with the said body of men, who found the said bill of indictment, before the said body of men had retired to consult upon the said bill; and the said Henry Barber was, on the said 8th day of January, 1848, and before the finding of the said bill, rejected and prohibited by the said circuit court, without any legal or justifiable cause, from assembling or convening with the said body of men, claiming to be grand jurors as aforesaid, and by whom the said bill of indictment was found; and this the said John Findley is ready to verify, &c. And the said John Findley further saith, that the said bill of indictment ought not to be had or further prosecuted against him, the said John Findley, because the said bill of indictment was found against him, the said John Findley, by a body of men claiming to be the grand jurors of the people of the state of Michigan, inquiring in and for the body of the county of Oakland, at the September term of the circuit court for the said county, in the year A. D. 1847, of and among which said body of men was one William B. Hibbard and one Peter Richardson, who had been originally drawn and summoned as grand jurors, and who were not sworn as such, which said William B. Hibbard and the said Peter Richardson were not of and did not belong to the grand jurors of the people of the state of Michigan, inquiring in and for the body of the county of Oakland, at the September term of said circuit court for the year A. D. 1847; and this the said John Findley is ready to verify."

This plea upon demurrer was adjudged to be bad. It was obviously bad on several grounds. 1. On the ground of duplicity: it states several distinct facts, having no relation to or dependence upon each other—as, that Henry Barber was improperly rejected by the court from serving upon the grand jury, and that Hibbard and Richardson were improperly empanneled upon that jury. There is also a great disregard of precision and accuracy, if there is not repugnancy in its statements. A plea in abatement should be certain to every intent, and be pleaded without any repugnancy. 1 Chitty's Pl. 492. It should also have a proper conclusion, praying judgment of the indictment and that it may be quashed. 1 Chitty's Crim. L. 449. It is said, in 1 Chitty's Pl. 496, "great accuracy is necessary in the form of all pleas in abatement, as well in the *commencement* as in the *conclusion*, for it is said '*they make the plea.*' A plea which concluded with praying judgment 'if' (instead of 'of') the plaintiff's bill, was held bad on demurrer, though the words 'and that the same may be quashed,' were also added."

To this plea there is no prayer of judgment. The plea is not verified by affidavit. Section 33, chapter 164 of the Revised Statutes provides, that "no plea in abatement, or other dilatory plea to the indictment, shall be received by any court, unless the party offering such plea shall prove the truth thereof by affidavit, or by some other evidence." Without such proof, it is no plea—a mere nullity. 3 Burr. 1617; 2 Stra. 1161; 2 Barn. & Cress. 618.

But we are all of opinion that the grand jury was properly constituted. These are the facts of the case: the grand jurors summoned at the September term, having finished the business before them, were dismissed by the court; afterwards, and before the adjournment of the court for the term, the crime for which the defendant was indicted was committed. At the common law it would have been competent for the court to have commanded another grand jury to be summoned and sworn. 2 Hale 156; 1 Chitty's Crim. L. 314. Our Revised Statutes, sec. 11, chap. 164, provide that, "when the grand jury attending any court shall have been dismissed before the court is adjourned without day, they may be summoned to attend again, in the same term, at such time as the court shall direct, and for the despatch of any business that may come before them."

Hibbard and Richardson, though belonging upon the list of grand jurors drawn and summoned to attend the September term of the court, for some reason, and it matters not what, were not at the commencement of the term sworn and empanneled; when the event had occurred which made proper the convocation a second time of the grand jury, they, with the others named in the grand jury list, were summoned, and appearing were sworn, and with the others empanneled. We do not see upon what principle it can be said, that these two persons were not qualified grand jurors, *probi et legales homines.* It is said that they were not sworn at the commencement of the term; and though grand jurors, that they did not belong to the grand jury inquiring in and for the body of the county of Oakland. If they had not been dismissed for the term, it would have been competent for the court at any time before the panel had been dismissed, upon their coming into court, to have sworn them, and sent them to their fellows. It has been very usual to do this when delinquent jurors have come in on the same day, after the jury have been sworn and charged. If it may be done that day, it may be done at any time during the session of the grand jury. It is a matter entirely in the discretion of the court; and circumstances, as the absence of a part of those empanneled, from sickness, or other cause, might make its exercise very proper. There are in the statute no words of limitation, confining the jurors to be reassembled, to those only who had at first been sworn, and performed the duties of grand jurors, by inquiring in and for the body of the county, into the crimes and misdemeanors committed therein.

Barber, who had been re-summoned with the others, did not appear until after the jury had been sworn and received the charge of the court; and, as is very frequently the case, there being enough without him, he was not sworn. This we consider to be a matter of discretion with the court, and, as we have already said, a usual practice, not only in this country, but in England. 1 Chitty's Crim. L. 313.

After the petit jury had received the charge of the court and retired to consider of their verdict, they sent for and were permitted by the court, against the wishes of the defendant, to have in their room a copy of the Revised Statutes. For this reason a new trial was moved for, and by the court denied; and this matter coming up, upon a bill of exceptions, is assigned for error.

In the sending for and receiving of this book, the jury were guilty of no misbehavior; and it is difficult to conceive how any use which they may have made of it could have injured the defendant. In the application of the law as given in charge to them by the court, the statute book, defining as it does the offence, and declaring it murder in the first or second degree, according to the mode and the circumstances of its perpetration, may have been to them a just and useful guide; the more so as it was their duty to ascertain, in their verdict, whether it be murder of the first or second degree.

If the jury, without the knowledge or approbation of the court, had procured this book, it would not, we think, be a sufficient cause for setting aside the verdict. Juries may, without the assent of the parties, take with them into their room, papers under seal which have been read in evidence; other papers and books which have been given in evidence, they have no right to take; but if they do take them, though it may be misbehaviour in them, it will not set aside the verdict. Co. Litt. 227 b.

In the case of the Commonwealth v. Jenkins, Thatcher's Crim. Cas. 108, it was held, that where the officer in attendance delivered to the jury at their request, without application to the court, after they had retired to consult upon a verdict, a volume of the laws of the state, containing the act upon which the indictment was founded, which act had been commented upon by the counsel and court, that this was not a sufficient ground for a new trial.

In another case, 7 Mo. R. 607, it is said that a jury ought not to be permitted to carry out law books with them, unless for the sake of referring to the law as stated in a paragraph marked out for them. Hardy *v*. State. While we think there was no error in this case, in the permission given by the court, that the jury might have a copy of the Revised Statutes, we are fully satisfied that the view taken of this matter by Lord Tenterden, 3 Carr. and Payne 310, is the correct one, and ought to be followed. After his lordship had summed up the case, and the jury had retired, they sent a message to his lordship, desiring to have Selwyn's Law of Nisi Prius sent them. His lordship, although both parties consented, said, the regular way is for the jury to come into court and receive the law from the court, and for the sake of precedent that course should be adopted now.

The judgment of the circuit court must be affirmed.

Judgment affirmed.

PORTER *v*. KIMBALL.

The general issue cannot be pleaded in a cause in the county court, or in the circuit court, under the act to regulate and define the jurisdiction of the circuit and county courts, Sess. L. 1848, p. 236. The pleadings in both courts must conform to the provisions of ch. 92, R. S.

A plea within the meaning of sec. 17, ch. 92, R. S., is simply a statement of the grounds of defence, without regard to the form of stating them; and yet they should be stated with such certainty as to enable the opposite party to understand definitely upon what the defendant relies as his defence.

CASE reserved from Lenawee Circuit Court.

Tiffany, for plaintiff.

Beaman and Cooley, for defendant.

By the court, WING, J. This is a motion made to set aside a default entered in the circuit court for the county of Lenawee, and the questions arising upon the motion were reserved by the circuit judge for the opinion of this court thereon.

The motion is made under the provisions of rule 6 of additional rules for the circuit courts, adopted May 4, 1848. The rule is as follows: "The defendant's default being duly entered, the plaintiff shall not be bound afterwards to accept a plea unless the defendant, as soon as he shall know that a default has been entered, shall plead issuably: which plea shall be in the manner, and verified by affidavit, according to the provisions of chapter 92 of the Revised Statutes of 1846."

This rule appeared to be necessary, and was adopted in reference to the fifth section of an act to regulate and define the jurisdiction of the circuit and county courts, approved April 3, 1848, Sess. L. 1848, p. 263. By this law it was enacted, in substance, that where in civil actions the plaintiff's demand was such that he could do so, he might, at his election, commence suit in the circuit court: but if he did so, his suit should be commenced and prosecuted in the same manner, and all the proceedings should be the same, as if it had been commenced and prosecuted in the county court, so far as the same shall be practicable.

The validity of the rule is not called in question. It will be conceded that it is practicable for a defendant to plead, so far as concerns the form, in the manner designated by the seventeenth section of chapter 92. In this case, defendant made default in pleading. The statute did not provide for such a case, and the rule was intended to provide for the difficulty, and the question raised, is, whether the plea, in form and substance, conforms to the requirements of the rule and the law. The Revised Statutes of 1846, chapter 99, section 22, enacted that no special plea in bar should be pleaded in any civil action hereafter to be commenced; but all matters of defence to any such action, might be given in evidence under the general issue. The defendant appears to have intended to frame his plea and notice under this provision of the Revised Statutes, since he has plead the general issue and set out his grounds of defence in a notice, to which is added an affidavit. In this I think he has misapprehended the effect of the law of 1848, by which the section last cited is in effect modified, if not repealed. The defendant appears to have considered the rule as pointing to an issuable plea as understood at the common law; and, as by section 22 of chapter 99, he was prohibited from pleading specially, and was only permitted to plead the general issue with notice, he adopted that form of pleading to satisfy the rule. But looking at the act of 1848, and considering its object and intent, I am satisfied the plea should have been made in conformity to the seventeenth section of chapter 92. It would then have been an issuable plea, as distinguished from the pleas authorized to be plead by section 19 of the same chapter, which, under the rule, could not have been plead after default. If I am correct in this view, the general issue cannot be plead in a cause in the county court, or in the circuit court, since the passage of the law of 1848; but the pleadings must conform to the provisions of chapter 92.

A plea, within the meaning of section 17, can have but little of the form of a plea at common law. The statute substantially prohibits the use of such a form, because a plea could not formerly be made in the form of an affidavit. The word plea, as here used, has not a technical signification—it means simply the statement of the grounds of defence, without any regard to the form of stating them, and yet, as to the matters of substance set forth in the plea, they should be stated with such certainty as to enable the opposite party to understand definitely upon what the defendant relies as a defence to the action.

The defendant is to be sworn to state his defence *truly*, and then to state the nature and ground of his defence, and submit to an examination touching the same. And if, under the proviso to this section, his plea is put in by an attorney, the plea or affidavit must specifically set forth the nature and grounds of his defence, and the other matters referred to in the section.

The plea, in the present case, is put in by the attorneys of the defendant. It is not in the usual form of an affidavit, but this, perhaps, would not be objectionable, if it contained a specific statement of the facts. It does not purport to state facts, to the truth of which the attorney swears either directly or indirectly. It commences with a statement that the defendant will give in evidence, and insist upon as a defence, that the note mentioned and set forth in the plaintiff's declaration is not owned or lawfully held by the said plaintiff, but that the same is now owned by the firm of Porter & Ballard, mentioned in said declaration, or by Giles W. Porter, or by some other person than the said plaintiff as assignee of said firm. Here is no fact asserted: the defendant says he will give in evidence, &c.—the whole statement in the notice is prefaced by this statement. He will prove it if he can—but he does not assert that it is so. It is not a simple direct relation of facts—it is very uncertain.

The notice applies to the time of filing the notice, and not to the time when the suit was commenced. It does not admit or deny the endorsement of the note; but says if it was endorsed, it was endorsed after it became due. It states that there has been a partial failure of consideration, occasioned in part by one thing, and in part by another; but not how much by each or either. After making other general statements, it states the amount of the partial failure was about seventy dollars, and he puts the plaintiff upon proof of the endorsement of the note. The notice is concluded as follows: "all of which *facts* stated in the notice are true, as the said defendant believes." Consistent with this affidavit, there might not be a single *fact* stated in the notice. Many of the matters are stated alternatively, and these statements are inconsistent with each other. If all are *facts*, it is manifest they cannot be true: and if all are not true, which are facts? I think the notice cannot be sustained as a plea, within the meaning of section 17, chapter 92, or rule 6, above cited, and, therefore, that the motion should not prevail.

Let it be certified to the circuit court for the county of Lenawee, that it is the opinion of this court that the motion should be denied.

Certified accordingly.

SUTTON v. FACEY.

What constituted a physician, within the meaning of the Exemption Act, (Ses. L. 1842, p. 70), and the act (Ses. L. 1844, p. 78) repealing ch. 2, tit. 8, part 1, R. S. 1838? *Query:*

Proof of plaintiff's having practiced as a physician is *prima facie* evidence of his professional character; and after such a *prima facie* case has been made out, a witness may be asked, "Was the plaintiff skilled in healing?" for the purpose of showing the plaintiff had no knowledge of the healing art.

Where the court charged the jury that the question, whether plaintiff was a practicing physician, had reference to the business he was engaged in, rather than to the skill with which he exercised that business: *Held*, that the charge was erroneous, as it was calculated to, and probably did, mislead the jury. Had the court stated to the jury, it had reference to the business in which the plaintiff was engaged, rather than to the *degree* of skill with which he exercised it, the jury would have understood that *some degree* of skill was necessary.

ERROR to Jackson Circuit Court. Replevin by Facey, for the unlawful detention, by Sutton, of a horse belonging to Facey. Sutton, who was a constable, justified the detention of the horse under two executions against Facey. On the trial in the circuit court, Facey insisted he was a practicing physician at the time the horse was taken, and that the same was exempted from levy and sale on the executions by the exemption act, Ses. L. 1842, p. 70. It did not appear he had any other horse; and the question was, whether he was a practicing physician within the meaning of the aforesaid act. The facts, with the charge of the court to the jury, and the rejection of certain testimony on the trial in the circuit court, are stated in the opinion of the court.

Frink, for plaintiff, in error.

D. Johnson, for defendant, in error.

By the court, GREEN, J. Facey, the plaintiff below, rested his claim to a recovery upon the exemption act, Ses. L. 1842, p. 70, the first section of which provides, that "to every practicing physician, one horse, bridle, saddle, surgical instruments and medicines, not exceeding in value one hundred dollars," shall be exempted from execution or sale for any debt, damages, fine or amercement whatever; and the principal question presented, depends upon the construction to be given to the term *practicing physician*, as used in that act.

When this law was enacted, chapter 2, title 8, part 1, of the Revised Statutes of 1838, entitled "Of medical societies, and regulations concerning the practice of physic and surgery," was in force; the 8th section of which provided, that no person should commence the practice of physic or surgery within this state until he should have passed an examination, and received a diploma from one of the societies mentioned therein; and rendered any person who should practice physic or surgery within this state without first having obtained such license, incapable of suing for or collecting any charges incurred by reason of having so practiced. It is very clear that, inasmuch as no person could legally commence the practice of physic or surgery without a diploma for that purpose, while that chapter was in force, no one could be recognized as a practicing physician who should commence the practice of physic without such a diploma. There is no difficulty, therefore, in determining what class of individuals was entitled to the benefit of the exemption, when the act of 1842 became a law. An individual might then have a diploma from the state medical society or a county medical society, authorizing him to practice physic, and yet not practice, and therefore not be entitled to the benefit of the exemption. But he would in law be a physician, and, whenever he entered upon the practice of his profession, would have a right to claim the benefit of the exemption law. But no person, however learned and skilful he might be, could, by entering upon and continuing the practice of physic, become, in contemplation of law, a physician, so long as the prohibitory statute existed; and therefore could not, as such, ever entitle himself to hold property exempt from execution. Any other construction of the language of the exemption law before referred to would involve the gross absurdity of conferring a right upon an individual, based upon the violation of an express prohibitory statute.

It is claimed, on the part of the plaintiff below, that by the subsequent modification and final repeal of the law regulating the practice of physic and surgery, a more enlarged application was given to the provision of the exemption act above quoted, and that at the time when the cause of action in this case is claimed to have accrued, every person who was engaged in the practice of physic, as an occupation or business, thereby became a physician, and entitled to hold a horse, &c., exempt from sale on execution.

The first section of the act numbered 38, of the Session Laws of 1843, repealed so much of sec. 8, ch. 2, title 8, part 1, of the R. S. of 1838, as rendered persons practicing physic or surgery without a license incapable of suing for or collecting charges incurred by reason of having so practiced. Section two of that act further provides, that "if any person who professes to be a physician or surgeon, or shall hold himself out to the public or any individual employing him, to be such, shall be guilty of any neglect or malpractice, an action on the case may be maintained against such person so professing, and the rules of the common law applicable to such actions against licensed physicians and surgeons shall be applicable to such actions on the case." This section was not repealed until the Revised Statutes of 1846 took effect, which was on the first day of March, 1847.

By the act, Ses. L. 1844, p. 73, it was provided, that in any county of this state where a medical society, composed of a majority of the physicians and surgeons of the county, should be thereafter organized on the principles of voluntary association, &c., the keeper of the prison of such county might deliver to the agent of such society the bodies of all criminals who should be executed within such county for a capital offence, &c.; and chap. 2, title 8, part 1, of the R. S. of 1838, was thereby repealed.

The last mentioned act continued in force until the R. S. of 1846 took effect.

It will thus be observed, that, from the time the exemption law was enacted, until after the trial of this cause in the circuit court, a certain class of individuals were recognized by our statutes as physicians, and that a distinction has at the same time been recognized between those who were such, in contemplation of law, aud those who might profess to be physicians, and hold themselves out to the public, or persons employing them, to be such.

The horse which the plaintiff below sought to recover in this action was seized by virtue of an executicn against him, in January, 1846, and in November of the same year, this cause was tried in the circuit court. What, at that time, constituted a "physician," within the meaning of the exemption law, and the law of 1844, before referred to?

It is evident that the exemption law originally had reference, so far as it related to physicians, only to a class of persons having certain evidence of their qualifications to practice the healing art, which evidence presupposed a competent knowledge of the human system, the diseases to which it is subject, and the proper remedies for their cure or alleviation, to enable its possessor to exercise his profession successfully. By the term *physicians*, in the law of 1844, the legislature seems to have intended those who were such under the law which that act repealed. It provides no new test by which to determine what shall constitute a person a physician. It recognizes them as a known class or description of persons, by a term which had for a long time previous, and then had, a well defined legal meaning in our statutes. Under those laws, the examination, by a body of men supposed to be competent to judge of the qualifications of the applicant, and the diploma which evinced their judgment in favor of his capacity to practice the healing art, were deemed a salutary and necessary safeguard to the public against imposition and fraud, and a necessary protection of the lives of the citizens from the assaults of presumptuous ignorance and reckless cupidity.

But, at the time when the horse in question was taken by the defendant below, there were no medical societies or other bodies or persons in this state who had power to grant a diploma, evincing the possession, by any individual, of the proper qualifications to practice as a physician; and does it therefore follow, that no one could become a physician in this state after the repeal of the law regulating the practice of physic and surgery? Perhaps when we consider the object which the legistature appeared to have in view, viz: to place all those who were practicing according to different theories, and under divers systems and modes of treatment, upon an equal footing, a somewhat broader construction of the statutes relating to physicians, and still remaining in force, may be fairly warranted. If so, the term physician may embrace those who have received the degree of doctor of physic from some institution legally authorized to confer it. It may also include those who can show that they are such within the general and common meaning of the term. Mr. Webster, in his dictionary, defines the word "physician" to be "a person skilled in the art of healing; one whose profession is to prescribe remedies for diseases." This definition implies the possession of all the qualifications which were evidenced by the diploma under the laws as they existed in 1842, when the exemption act was passed; but whether the person be skilled in the cure of diseases by means of allopathic, homœopathic, hydropathic or botanic treatment, is not material. Skill in any of the modes mentioned, includes a competent knowledge of the human system, of the diseases to which it is subject, the symptoms by which they are detected and distinguished, and of the remedies adapted to their cure.

As to the evidence necessary to establish the character of a physician, it has been holden in an action on the case for slandering a person in his profession, where the plaintiff alleged generally that he was a physician, that parol proof of his having practiced as such was *prima facie* sufficient evidence of professional character, but subject to be overthrown by any competent evidence to the contrary, 2 Starkie's Ev. 218 and note x; and, although it has been held otherwise, the weight of authority, and the analogies of the law of evidence, seem to be in favor of this rule. But this rule assumes that practicing as such does not constitute the person a physician, but only creates a presumption of fact that he is so, until such presumption is rebutted, and indicates the same distinction between those who are physicians, and those who profess and "hold themselves out" to be such without possessing the requisite qualifications, which is recognized by the law of 1848.

In the case before us, the testimony on the part of the plaintiff in the court below, may probably have been sufficient, *prima facie*, to show that he was a physician. It showed that he had kept an office, held himself out as a physician, and been called, as such, to visit the sick; and the professions of skill on his part, as exhibited in his advertisements, were certainly most ample, and if well supported in his practice, should have secured him a most enviable reputation in his profession, and the substantial reward which great merit so richly deserves, but frequently fails to obtain.

Assuming that the meaning of the term physician, as used in the exemption act, has been enlarged by subsequent legislation, as above suggested, (but which may be considered at least doubtful,) and that the plaintiff below brought himself *prima facie* within the meaning of the statute, yet it was still competent for the defendant below to prove, if he could, that Facey was not a physician. For this purpose, Sutton introduced proof that Facey admitted to Baker and others that he was not a physician, and that he said to the witness McClure that he never read a medical work. Another witness testified that Facey did not doctor his own children; and other testimony was given tending to show that he knew little or nothing of the science of medicine or the art of healing. The witness McClure, after stating that he was a practicing physician, and had been for thirty years, &c., was asked the question, "was the plaintiff skilled in healing?" which question was objected to by the counsel for the plaintiff, and the court sustained the objection, to which decision exception was taken. This ruling of the court is one of the grounds of error assigned in this court. The particular extent of the plaintiff's professional knowledge, would not have been the proper subject of inquiry: for the law furnished no standard by which it could be exactly measured. But this question did not aim at determining the *degree* of skill he might have possessed, but rather seems to have been intended to show that he had *no* knowledge of the healing art. This question, therefore, seems to have been a proper one for the purpose of eliciting evidence that Facey was not a physician.

The court charged the jury that the question, whether the plaintiff was a practicing physician, had reference to the business he was engaged in, rather than to the skill with which he exercised that business. This portion of the charge was calculated to, and probably did, mislead the jury. Had the court said it had reference to the business in which he was engaged, rather than to the *degree* of skill with which he exercised it, the jury would have understood that *some degree* of skill was necessary; but the language used by the court below implies that if Facey was occupied in the business of practicing physic, he was therefore a physician, within the meaning of the exemption law, whether he had any knowledge of diseases and remedies or not. In this portion of the charge I think the court below erred.

We are not disposed to go any further in this case than is indispensably necessary to its decision: the questions presented being new, the argument in this court having been rather meagre, and a brief having been furnished on one side only, and no references having been made by counsel to adjudged cases calculated to throw much light upon our path.

We therefore refrain from expressing any decisive opinion as to what constituted a physician, within the meaning of the exemption act of 1842, at the time when the property in controversy in this cause was taken by the defendant below.

Being satisfied, however, that, giving the exemption act the most enlarged construction that it can receive, the court below erred in the matters above noticed, the judgment of the circuit court must be reversed, and a new trial allowed, the costs to abide the event.

Judgment reversed.

KINNIE v. OWEN ET AL.

The general issue in all civil actions under R. S. ch. 99, sec. 22, traverses every material averment in the plaintiff's declaration, which must be proved, whatever the nature or form of action may be.

CASE reserved from Wayne Circuit Court. The vessel Manhattan was attached for carelessly running down the Saltillo, with a cargo of wheat on board, under ch. 122, R. S., at the instance of Perry, who was a part owner of the Saltillo; and Kinnie, who owned the wheat, filed his claim under the attachment. A bond was given under the thirteenth section of the act, and the vessel was released. The present action was on this bond; and to the declaration, assigning breaches of the condition of the bond, defendants plead the general issue, by demanding a trial of the matters set forth in the plaintiff's declaration—the form of the general issue in all civil cases prescribed by R. S., chapter 99, section 22. No notice accompanied the plea. When the cause was called on for trial, the plaintiff's counsel stated that, under the plea, they deemed it unnecessary to prove any thing more than the execution of the bond; and that it would be incompetent for defendants to give any other evidence than such as was admissible under the plea of *non est factum*. Thereupon, to save time, it was agreed plaintiff should proceed with his case; that defendants should introduce their entire defence, subject to the aforesaid objection; and that if, upon the whole case, the court should deem plaintiff entitled to recover, such should be the judgment of the court; if not, then the court should pass on the objection, and the plaintiff have the benefit of it. The trial proceeded, and a verdict having been rendered for defendants, the court overruled the plaintiff's objection, and held the defendants' plea sufficient to admit a defence on the merits. Plaintiff excepted, and the question was reserved for the opinion of this court.

Fraser, Van Dyke and Emmons, for plaintiff.

Joy and Bates, for defendants.

By the court, MUNDY, J. The solution of the questions presented in this case, depends, we think, upon a just construction of the Revised Statutes of 1846, and especially of those provisions which abolish in all civil actions special pleading, permitting all matters of defence to be given in evidence under the general issue, and providing for a notice under such issue of those matters which, by the old rules of pleading, were to be specially pleaded, or special notice thereof given under the general issue. The object of the legislature unquestionably was the saving to suitors the vexation and expense too frequently the result of the subtleties of special pleading.

The legislature provided, by section 22, chapter 99 of the late Revision, that "no special plea in bar shall be pleaded in any civil action hereafter to be commenced; but all matters of defence in any such action may be given in evidence under the general issue;" and by section 23, "in all civil actions hereafter to be commenced, the general issue shall consist of a demand by the defendant of a trial of the matters set forth in the plaintiff's declaration."

It is to be remarked here that the legislature not only provided, that in all civil cases the issue between the parties shall be the general issue; but that they determined the form, the substance and the effect of that plea. It shall consist of a demand by the defendant of a trial of the matters set forth in the plaintiff's declaration. That is, by this plea, the court is called upon to pass upon the plaintiff's cause of action; to hear, try and determine the matters set forth in his declaration. What matters? Looking at the case now before us, shall we say, as is claimed by the counsel for the plaintiff, the matter only whether the bond was made by the defendants: or shall we say, all those matters averred by him in his declaration, as constituting his cause of action. It seems to us, that from the language of the legislature, there can be no doubt upon this subject.

This is to be the plea in all cases, irrespective of the cause or the form of action: whether the action be founded upon contract, or upon tort—whether in form it be in debt, or in case, the cause of action, as alleged in the declaration, is by this plea put in issue.

Under this rule of pleading, the only question, so far as matters of defence are concerned, which can in any case arise, is, whether they are such as the practice of our courts requires to be specially pleaded.

What the matters of defence given in evidence under the general issue in this case, were, does not appear. It does not appear that any thing was given in evidence, supposing the plea to put in issue all of the material averments in the declaration, which, by the former practice, should have been specially pleaded or noticed under the general issue; and looking at the cause of action, we cannot conceive the necessity for, nor the existence of any such matter of defence, unless it might be the statute of limitations.

Aside from the bond—and this is merely incidental, made so by the statute—the matters in controversy are precisely the same as if the action had been in case against the owner of the boat. The decision must have turned upon the question of negligence; this the plaintiff must have established, to have entitled himself to a verdict; and, surely, if the action had been case, the defendants might, under the general issue, have given in evidence all the circumstances attendant upon the collision of the two boats.

Certified accordingly.

SPIER v. M'QUEEN.

S. sued M. in a justice's court, and employed W., an attorney at law, to appear and prosecute the suit for him on the return day. W. was prevented from attending to the suit on that day, and requested S. to appear, who appeared accordingly. M. objected to S.'s appearance, and required him to prove his authority, and S. not being able to prove a formal authority, the action failed. *Held*, these facts did not make out a case, within sec. 11 of ch. 2, tit. 6, part 3, R. S. 1833 (of the limitation of personal actions), allowing a new action to be brought within one year thereafter.

CASE reserved from Eaton Circuit Court. Assumpsit. Plea, statute of limitations. Replication, a previous suit duly commenced before a justice of the peace, within six years; and that, on the return day of the summons therein, one Wilkinson, an attorney at law, whom the plaintiff had previously employed to appear and prosecute the suit for him, was necessarily absent from Eaton Rapids, the place of holding the court, and that Wilkinson desired one Shaw to appear and prosecute the action on the return day: that Shaw appeared; that defendant objected to his appearance, and required him to prove his authority; and that Shaw not being able to prove a formal authority, the action was avoided and defeated for the want of form aforesaid: that the cause of action in the former and present suits was identical; that it accrued within six years next before the commencement of the first suit; and that the present suit was commenced within one year next after the determination of the first suit. Defendant demurred, and plaintiff joined in the demurrer.

Kimball and Sumner, for plaintiff.

Chatfield, for defendant.

By the court, WHIPPLE, Ch. J. The solution of the question raised by the demurrer must depend upon the construction of sec. 11, chap. 2, tit. 6, part 3 of the revision of 1838. That section provides, "that if in any action, duly commenced within the time limited in this chapter and allowed therefor, the writ shall fail of a sufficient service or return, by any unavoidable accident, or by any neglect or default of the officer to whom it is committed; or if the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form; or, if after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or the determination of the original suit; or, after the reversal of the judgment therein."

I am unable to perceive how the plaintiff can shelter himself under the provisions of this section. The authority of Shaw to appear as attorney was requested by the defendant; and the statute, upon such request being made, required, in express terms, that his authority should be proved, either by his own or other competent testimony. This proof not being exhibited, the action was defeated for want of appearance at the return day of the process.

The failure of any action, for such a cause, does not fall within the saving clauses of the 11th section. The demand made by the defendant was not mere "*matter of form.*" It was a right conferred by statute; and if the plaintiff failed to furnish his agent with the necessary authority, or if the agent, having the authority, neglected to make the necessary proof, there was, in a legal sense, no appearance, and judgment of nonsuit must have been the consequence.

We should have been glad to have relieved the plaintiff from the difficulties into which he was drawn by his own inadvertence or by the want of skill on the part of his agent; but it would be extending the statute to a case not within its terms, if we allowed the replication to stand as a sufficient answer to the plea.

Let it be certified to the circuit court of the county of Eaton, as the opinion of this court, that the demurrer to the replication should be sustained.

Certified accordingly.

WALES v. JONES.

Plaintiff commenced two suits against defendant on the same day, for the same cause of action—one by declaration and the other by attachment. The court presumed, nothing appearing on the record to the contrary, that the suit by declaration was first commenced, and held that a plea of that suit in abatement of the attachment suit was bad, because the plea did not state that it was still pending.

Where a plea in abatement averred another suit was commenced at the same time, upon and for the not performing the very same identical promises and undertakings, without adding, *in the said declaration in this present suit mentioned*, or other equivalent words, it was held bad on that account.

CASE reserved from Wayne Circuit Court. Suit by attachment. Plea in abatement, of the commencement of another suit at the same time and for the same cause of action. Demurrer and joinder.

Van Dyke and Emmons, for plaintiff.

Lothrop and Duffield, for defendant.

By the court, GREEN, J. Several questions were made on the argument of the demurrer in this cause, and it is insisted that the plea in abatement is bad: 1, Because it does not aver that the other suit is still pending at the time of pleading.

The general rule seems to be well settled, according to the English authorities, that when two suits are commenced at the same time, for the same cause of action, they mutually abate each other; and that the writs in both being bad, *ab initio*, no subsequent discontinuance of one will make the other good; and that a former suit for the same cause, pending at the time of purchasing a second writ, may be pleaded in abatement of the second suit, without alleging that the first suit is pending at the time of putting in the plea. The reason assigned is, that "the law abhors a multiplicity of suits; and therefore, whenever it appears on record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate; for if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer in *infinitum;* and it is not necessary that both should be pending at the time of the defendant's pleading in abatement; for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious, and ill *ab initio.*" See 1 Bac. Abr. 13, Dublin ed. of 1786.

In New York it has been holden, that if the former suit be discontinued before receiving the plea in abatement, such plea cannot prevail. 1 John. Cas. 397.

Mr. Gould, in his Treatise on Pleading, p. 284, says: "It is immaterial whether the first suit is pending at the time of defendant's *pleading* in abatement of the second. If the first was pending when the second was *commenced,* the latter may be abated, as being *vexatious ab initio.* And on principle, it seems that this plea can never prevail, except in cases where the latter suit is *vexatious.* Hence, when it appears that the first action must have been *ineffectual,* the courts of Connecticut have often determined that its pendency shall not abate the second, because, in such a case, the latter is not *vexatious.*"

This appears to be the sound and reasonable doctrine upon the subject, and will perhaps reconcile the apparent diversity of decisions in the courts of the different states and in England. When a plaintiff at the same time commences two suits in the same form, for the same cause of action, and causes the defendant to be arrested and held to bail in both, or his goods to be attached in both, it is at once apparent that his conduct is vexatious and oppressive, and a palpable abuse of the process of the court, and justice forbids that he should derive any benefit from either of his suits. But where the record shows apparent good faith in the commencement of the second suit, and that the first was discontinued before the defendant is called upon to plead in the second, so that he is not unnecessarily harrassed by the defence of two suits for the same cause at the same time, the second suit cannot be deemed vexatious, and cannot therefore be abated by the pendency of the prior suit when it was commenced. On the contrary, to hold the second suit abateable for that cause, would be to make the law favor, rather than abhor, a multiplicity of suits, inasmuch as it would render another action necessary, when the plaintiff's claim is a meritorious one.

In the present case, it appears from the record, that on the same day, the plaintiff commenced an action against the defendant by declaration, under the statute; and also sued out an attachment against his goods and chattels; and that the declaration and attachment were both served on the same day. It being deemed impossible, and, indeed, not being averred, that both suits were actually commenced at precisely the same point of time, we cannot presume that the attachment suit was actually commenced first, but, nothing appearing in the record to the contrary, we may fairly infer that the suit by declaration was in fact first commenced.

Upon looking into the record, we find an affidavit of the plaintiff, sworn to on the same day, setting forth that the defendant is indebted to him, &c., "and that said Jones is about to assign or dispose of his property with the intention of defrauding his creditors," &c., the substance of which affidavit is recited in the writ of attachment.

The question now arises, whether a creditor, after commencing a personal action against his debtor, if he shall discover that such debtor is about to dispose of his property for the purpose of defrauding him of his debt, may lawfully avail himself of the special remedy afforded by the statute in such case, to secure himself against the consequences of the contemplated fraud? I think he may, and that the plea not averring the other suit to be still pending, is bad.

2. It is also objected that the plea is bad, because it avers only that the other suit was brought "upon and for the not performing the very same identical promises and undertakings," without adding the words, "*in the said declaration in this present suit mentioned*," or other words equivalent thereto, showing what promises and undertakings are referred to.

Pleas in abatement are not to be favored, and certainty to every intent is required. Nothing can be taken by intendment in favor of the pleader; and without intending something which is not expressed in the plea, it is entirely uncertain. It is said, in 3 Chitty's Pl. 903, note y, that the precedents of pleas in abatement of another action depending, vary in point of form; sometimes they set forth the declaration in the first action—but others, as in the precedent there found, are more concise; and various precedents in each form are referred to. The precedent in Chitty, and those referred to of that description, contain the words, *in the said declaration in this present suit mentioned;* and so, I believe, are all the precedents in which the declaration in the first suit is not set forth in the plea.

Several other objections were raised upon the argument, which it is not necessary to notice.

It must be certified to the circuit court for the county of Wayne, as the opinion of this court, that the plaintiff is entitled to judgment upon the demurrer, and that the defendant answer over.

Certified accordingly.

MILLER *v.* CHAFFEE.

Disputed questions of fact cannot be reviewed, on a writ of error brought on a judgment of the circuit court affirming, on certiorari, a judgment of the county court.

ERROR to Wayne Circuit Court, on a judgment of that court affirming, on certiorari, a judgment of the county court.

Bishop, for plaintiff in error.

Van Dyke and Emmons, for defendant in error.

By the court, MILES, J. The question is, whether, upon this writ of error, we have any thing to do with the disputed questions of fact, determined by the county court.

A writ of error is said to lie only upon matters of law arising upon the face of the proceedings. 2 Chit. Black. 406.

By the statute, a review of the proceedings and judgment of the county court may be had upon certiorari; and the circuit is in such case required to give judgment in the cause as the right of the matter shall appear, without regarding technical omissions, &c., which did not affect the merits.

It is not our intention, inasmuch as it is not necessary in this case, to define the extent of the jurisdiction of the circuit court under the statute; but we refer to it for the purpose of introducing a decision of the supreme court of the state of New York, showing the views there entertained under a statute with a similar provision. By that statute, a court of common pleas was authorized to review upon certiorari the judgments of a justice of the peace, and to decide according to the justice of the case, disregarding matters of form which did not affect the merits.

In the case of Whitney *v.* Sutton, 10 Wendell 412, the common pleas having reversed the judgment of the justice recovered by the plaintiff below, he sued out a writ of error, returnable in the supreme court, which brought up the record of the common pleas containing the justice's return. From that return it appeared that the questions raised before the justice were both of law and fact.

The court there say, Savage, Ch. J., " with the questions of fact which were disputed, we have nothing to do: upon a writ of error we can correct errors of law only." And, further, " whether the decision was according to the right of the case, was a proper question to be reviewed by the common pleas, and is not a proper question for review by this court."

As we have before said, we do not now pretend to determine the proper mode of reviewing questions of fact by the circuit court, but solely to declare that this statute has not conferred upon this court any additional powers, or required from it the performance of any other duties than before existed at common law.

There being, then, no error found in the judgment of the circuit court, the same must be affirmed.

Judgment affirmed.

AUSTIN v. STRONG.

Where an affidavit for an appeal from the judgment of a justice, under sec. 2 of the act, Ses. L. 1845, p. 98, was made by an attorney of the party and stated, that plaintiff recovered five dollars more than was justly and honestly due him, as deponent believed, from the facts and evidence in the cause, which were fully communicated to him, it was held sufficient.

The recognizance for an appeal under the act, Ses. L. 1845, p. 98, must be taken before the justice by whom the cause was tried.

CASE submitted by agreement of parties.

Van Dyke and Emmons, for plaintiff.

Lothrop and Duffield, for defendant.

By the court, WHIPPLE, Ch. J. This cause was originally commenced before a justice of the peace, and was by appeal taken to the circuit court of the county of Wayne. A motion was made in that court to dismiss the appeal, on the ground of the insufficiency of the affidavit and recognizance required by the statute. The circuit court deeming the affidavit insufficient, dismissed the appeal.

The parties, by their counsel, having waived the issuing of a writ of error, have agreed to submit the record to this court, in order that the decision of the court below might be reviewed.

The second section of the act of 1845, amendatory of the justices' act of 1841, provides, that "no party against whom a judgment has been rendered by a justice of the peace, upon any claim arising upon contract, express or implied, shall appeal therefrom to the circuit court, unless such party, his agent or attorney, shall within five days after the rendition of such judgment, make and present to such justice an affidavit, alleging therein that the party recovering such judgment had recovered therein at least five dollars more than was justly and honestly due such party."

It is objected to the affidavit, that it does not appear that the attorney was ever fully advised by the defendant of the merits of the case;

or that all the facts and evidence were elicited on the trial before the justice, or that the attorney was present at the trial and heard the evidence.

I think it could never have been intended by the legislature, that when the affidavit was made by an agent or attorney, that he should swear *positively* that the prevailing party recovered five dollars more than was honestly and justly due him. This could not, in the nature of things, be done, except in cases where the agent or attorney had a personal knowledge of the facts. Generally, however, the attorney does not possess this personal knowledge, but derives the facts from his client, upon whom he must necessarily rely. The affidavit in this case, after stating that the plaintiff recovered five dollars more than was justly and honestly due, concludes as follows: " As deponent believes, from the facts and evidence in the cause, which are fully communicated to him,"

The qualifying words, "as deponent believes," are unobjectionable for the reasons already given. Had the affidavit concluded with these words, no question could have been raised respecting its sufficiency: it would have been a substantial compliance with the statute. But this belief is said to be founded on insufficient grounds. It is true, that the attorney does not, in words, swear that the facts were communicated to him by his client, or that he was present at the trial before the justice, and heard the evidence. But is not this fairly implied?

The facts in the cause, and the evidence in the cause, are stated in positive terms to have been communicated to the attorney. From what source and in what manner did he derive a knowledge of those facts, and of the evidence in the cause? We must necessarily consult our experience in determining this question. With respect to the facts, as I have already said, they are usually derived from the client. But another and a more satisfactory mode of ascertaining them, is, from the evidence given on the trial of the cause, when the facts are communicated under the sanction of an oath. Although it does not affirmatively appear in the affidavit that the attorney was present at the trial, yet I think it is fair to infer that such was the fact—indeed, the inference is supported by the return of the justice, which shows that the defendant did appear, by his attorney, Mr. Lothrop. But I am inclined to think that it is not necessary to state how the facts were made known to the attorney: it is sufficient if he swears that the facts have been communicated to him; if it should afterwards appear that they had not been communicated to him, he would render himself liable in a criminal prosecution.

If, as contended by the plaintiff, it is a fair construction of the affidavit to say, that the facts were only made known to the attorney through the medium of the evidence rendered on the trial before the justice, I still think the attorney might well act upon the facts thus disclosed in forming an opinion as to whether or not the plaintiff had recovered more than was justly and honestly due to him. It may be true, that *all* the facts might not have been elicited on the trial, but the fair presumption is that the plaintiff adduced all the proof which he could command in support of his right to recover. However this may be, the attorney has sworn that, according to his belief, the plaintiff recovered five dollars more than was honestly and justly due to him, and that this belief was founded on the facts and evidence in the cause, which were fully communicated to him.

Upon the other question raised by counsel, I am of opinion, that, under the act of 1845, the recognizance can only be taken before the justice by whom the cause is tried. This the statute clearly contemplates. Section 4 provides, that the party appealing shall, *at the time* he enters into a recognizance, "pay to such justice the costs of the suit, and one dollar for making and filing his return." How can the appellant pay the costs &c. "*at the time* of entering into the recognizance," unless it be entered into before the justice by whom the cause was tried? But the fifth section is more decisive of the question: it provides, that "no justice of the peace shall receive any recognizance on appeal as hereinbefore provided, unless the person entering into the same as surety, justifies his responsibility on oath, and answers any question touching his pecuniary responsibility, which *such justice* may deem proper to put." The justice who *receives* the recognizance is the one by whom the cause was tried; and the act expressly directs that he shall not *receive* it, unless the surety justifies, and answers any question touching his pecuniary responsibility, which *such justice* may deem proper to put.

Whatever may have been the rule previous to the act of 1845, it seems quite clear that that act cannot be carried into effect, unless the justice who tries the cause also takes the recognizance.

We think, therefore, that while the affidavit was sufficient, that the recognizance should have been taken by the justice who tried the cause.

MAY *v.* TILLMAN.

M., in 1815, conveyed certain premises by warranty deed to R., who afterwards died, and E. R., his widow, applied to the governor and judges of the territory of Michigan, as the widow and legal representative of R., under the act of congress of April 21, 1806, entitled "An act to provide for the adjustment of titles of lands in the town of Detroit and territory of Michigan, and for other purposes," placing her application on the deed from M. to R., and in pursuance of such application the premises were deeded to her. In an action of ejectment brought by the widow of M. for her right of dower in the premises, it was held E. R. and those claiming under her were estopped, by the deed from M. to R., from denying the seizin of M.

CASE reserved from Wayne Circuit Court. Ejectment for dower. The facts are fully stated in the opinion of the court.

Davidson, for plaintiff.

Backus, for defendant.

By the court, GREEN, J. James May, the husband of the plaintiff, for several years prior to the 15th of November, 1815, held the premises in question, with the exception of a small parcel thereof, under deeds of conveyance in fee from several individuals; and on the last mentioned day he conveyed the same to Duncan Reid, by a warranty deed indented. Reed subsequently died; and Mrs. Eleanor Reid, his widow, (now Mrs. Sheldon) applied to the governor and judges of the late territory of Michigan, as the widow and legal representative of the said Duncan Reid, under the act of Congress of April 21, 1806, entitled "An act to provide for the adjustment of titles of land in the town of Detroit and territory of Michigan, and for other purposes," for a deed of the same; which application was made under and by virtue of the said deed from May; and in pursuance of said application the lands were deeded to her. The defendant is in possession, under Mrs. Sheldon.

The first section of the act of Congress referred to provides, "that the governor and judges of the territory of Michigan shall be, and they or any three of them are, hereby authorized to lay out a town, including the whole of the old town of Detroit, and ten thousand acres adjacent, excepting such parts as the president of the United States shall direct to be reserved for the use of the military department, and shall hear, examine and finally adjust all claims to lots therein, and give deeds for the same."

It is insisted, on the part of the defendant, that May had only an equitable title to the premises in question, upon which no right of dower could attach. At the common law a widow could not be endowed of an equity of redemption, or other mere equitable interest; and the question in this case is, whether the title of May is to be deemed a *legal* title. In the case of May *v.* Specht *et al*,* decided at the present term of this court, the character of a title acquired by conveyance and possession, while the paramount title was in the government of the United States, was considered. In this case it does not appear whether actual possession accompanied the conveyances to and from May or not, and it does not seem to be material, inasmuch as the law under which the premises were deeded to Mrs. Reid did not make possession a pre-requisite to the giving of the deed. The powers of the governor and judges extended only to the hearing, examining, and finally adjusting all *claims* to lots in the city of Detroit. Mrs. Reid *claimed* the lots in question as the widow and legal representative of Duncan Reid, her late husband, under and by virtue of the deed from May. What estate did she claim by virtue of that deed? Evidently an estate in fee simple; and this claim was recognized as good, and the lots were deeded to her accordingly.

By what right does she now claim? Can she now say, that she claims solely under the deed of the governor and judges, or of the mayor, recorder and common council of Detroit, who succeeded to the powers of the governor and judges? I apprehend not. The deed to her operated merely as an extinguishment of the title of the United States, and was a recognition of the *legal* title which May *claimed* and conveyed to Reid, and which *she* claimed, as the legal representative of her husband. While we might hesitate to apply the strictly technical doctrine of estoppel in a case where it would work gross injustice, as we believe in many cases it has done, yet we feel no hesitation in saying that Duncan Reid, and Mrs. Sheldon, who claims under him, ought to be bound by their solemn admissions, and estopped from denying legal seizin in James May during the coverture. The application of that rule in this case, operates to prevent injustice, and not to produce it; and this class of cases, it seems to me, ought long ago to have been distinguished from that in which the party has been debarred from showing the purchase of an adverse paramount title, set up in opposition to that under which the possession was obtained, and when the party has been obliged to pay the full original value of the estate, in order to avoid an eviction, and save his improvements.

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* Ante, p. 187.

In the case of Blake & Goodhue, *v.* Tucker, 12 Vermont R. 44, the court say, "the whole doctrine of estoppel is based upon this principle: to effect justice and prevent wrong." In that case, it was holden, that a charter granted by the state of Vermont in 1791, enured for the benefit of the grantee of the person to whom the charter was made, by a deed of quit claim and release, with a covenant of warranty against all claims of all persons claiming the same under the grantor, his heirs or assigns, or the state of Vermont.

In the case of Vanderheyden *v.* Crandall, 2 Denio 9, the facts were briefly these: On the 1st August, 1792, M. V., having only an equitable interest for life, (the legal estate being vested in trustees,) executed a mortgage with covenant of seizin, to the loan officers of the county of Rensselaer. On the 18th of September, 1799, upon a foreclosure of the mortgage, the loan officers conveyed the premises in fee to P. In 1809, the fee simple passed to M. V., the mortgagor, by descent, on the death of his son, D. M. V., in whom the remainder of the estate had been vested by devise. The question arose between those holding under the title derived from P., the purchaser under the mortgage, and those claiming under the heirs of M. V., who died in 1825. The court say, that the remainder in fee simple, which vested in M. V.

on the decease of D. M. V., enured by way of estoppel, to the benefit of the purchaser at the mortgage sale, which was a fee simple absolute; and many authorities are cited, establishing this doctrine. See, also, 2 Hill 303.

In the last cited case, a patent was issued in the name of a deceased soldier, and it was held to confirm the title of the heirs, and of all persons deriving title from or through them as purchasers and devisees. "But," says Chief Justice Nelson, "the purchaser takes the estate *cum onore.* If the heir, from whom he derives title, has encumbered it by mortgage or otherwise, he takes subject to the charge, the same as in any other case of purchase; and so as to the devisee of the heir, who is put in the same category with the purchaser. If a lease for life or for years has been made by the heir before the conveyance or devise, the purchaser or devisee must take subject to it: and the same rule prevails in respect to an inchoate estate in dower, or any other interest created either by the act of law or of the heir."

It must be certified to the circuit court for the county of Wayne, as the opinion of this court upon the questions reserved in this case, that the plaintiff is entitled to recover her dower in the premises in question.

Certified accordingly.

STEWART v. HILL.

H commenced a suit against S, in the county court, by filing a declaration and making and filing an affidavit, under the first subdivision of sec. 39, R. S. 384, on which a warrant was issued against S, who was arrested and brought into court, when he applied for and obtained an adjournment of the cause, without pleading, on giving bail. On the adjourned day he appeared and moved to set aside the proceedings, for the reasons: 1, That the affidavit was not annexed to and returned with the writ. 2, That the note and mortgage on which the suit was brought, were not filed at the time of filing the declaration. 3d, That a copy of the affidavit was not served on him—which motion was overruled. He then offered to introduce testimony to controvert the facts stated in the affidavit, which

the court refused to receive. *Held*, 1, That it was too late after his appearance to the action by giving bail, to object to the regularity of the proceedings or the sufficiency of the affidavit. 2, That on their merits the questions were rightly disposed of by the county court.

Error to Wayne Circuit Court.

Gray, for plaintiff, in error.

Bishop, for defendant, in error.

By the Court, Mundy, J. This suit was commenced in the county court of Wayne county, on the 25th day of June, 1847, by Hill against Stewart, by filing a declaration and a copy of the note upon which the suit was founded. At the time of filing the declaration, the plaintiff's attorney made and filed, under the first subdivision of sec. 39 of the R. S., p. 384, an affidavit. On the 26th of June the defendant was brought before the court upon a warrant, issued under the provisions of the aforesaid section; and upon his application, and upon his giving the bail bond required by the statute, the cause was adjourned until the 30th of June. Upon the appearance of the parties on that day, the defendant asked and obtained a continuance on account of the absence of his attorney, until the 5th day of July, 1847; on which day the defendant again by his attorney, and without pleading, obtained a continuance until the next day. On the 6th of July the parties having appeared, the defendant's attorney moved to quash and set aside the proceedings for the following reasons: 1, That the affidavit was not annexed to and returned with the writ: 2, That the note and mortgage upon which the suit was brought, were not filed, and did not appear to have been presented to the court at the time of filing the declaration: and 3, That the copy of the affidavit was not served on the defendant at the time of serving the warrant; which motion was overruled. The defendant's counsel then offered to introduce testimony to controvert the facts contained in the affidavit, which was also overruled. The defendant then put in his plea. No objection was made to the sufficiency of the affidavit.

We think it was too late, after the defendant's appearance to the action, which appearance was perfected by his giving the bail bond required by the statute, to object either to the regularity or the sufficiency of the affidavit.

It is well established, that if the defendant appear to the writ, although it be absolutely void and he be ignorant of the fact, at the time of the appearance, he will be regarded as regularly in court, and the court will not set the writ aside. 5 Cowen 15; 7 id. 366; 17 John. R. 63. We know of no practice in support of the defendant's offer to controvert the facts set forth in the affidavit.

There is no analogy between this proceeding and that under chapter 141, entitled, "Of the punishment of fraudulent debtors."

There the object of the proceeding is to ascertain whether or not the defendant be guilty of the fraud charged in the affidavit, for the purpose of punishment if he be guilty; and to that end, an issue is made up and tried in the particular manner in that chapter provided. It is assigned for error also, that the circuit court erred in affirming the judgment of the county court—the affidavit on which the warrant issued, not showing fraud in the note declared upon; and the same being insufficient, and not setting forth the facts and circumstances showing the alleged fraud.

As the appearance of a defendant, by putting in bail upon a capias ad respondendum, is a waiver of any insufficiency in the affidavit upon which such writ was sued out; so, as we have before intimated, the appearance of the defendant in this case, effected by his entering into the bail bond required by the statute, and his asking and obtaining three adjournments without making any objection to the regularity of the proceedings, was a waiver of any defect in the affidavit, if any such defect exists. The office of this affidavit was simply to authorize the issuing of a warrant. The court had jurisdiction of the subject matter; and the appearance of the defendant to the suit gave to it jurisdiction of his person. It was then too late to raise any question upon the sufficiency of the affidavit in the county court: whether these objections were made in the circuit court or not, does not appear from the record. We are satisfied that they could not rightfully have been made there—they are clearly not the subject matter of consideration here.

We might thus dispose of this case without any expression of opinion upon the merits of the questions raised in the county court; but, as they were questions of practice—I speak of the questions referred to in the commencement of this opinion—depending upon the construction of the statute, we think proper to say that they were rightly disposed of upon their merits in that court.

The judgment of the circuit court must be affirmed, with costs,

Judgment affirmed.

WALL *v.* EASTMAN.

Where the moderator of a school district refused to sign a warrant to a rate bill for teacher's wages, and a judgment was afterwards recovered by the teacher against the district for the amount due him, which was paid by a tax on the district, a tax-payer, who was assessed and had paid his part of the tax, cannot sustain an action against the moderator to recover what he had paid.

CASE reserved from Jackson Circuit Court. Eastman sued Wall in a justice's court, in an action on the case, to recover eight dollars tax, which he as resident of a school district had been compelled to pay, by reason of Wall's refusal, as moderator of the district, to sign a warrant to the rate bill for teacher's wages. The substance of the declaration, which was demurred to, is stated in the opinion of the court. The justice rendered judgment for Eastman, and Wall appealed to the county court, which also gave judgment against him, when he carried the case to the circuit court by certiorari.

Johnson, for plaintiff in error.

Frink, for defendant in error.

By the court, GREEN, J. The question reserved in this case, is, whether the declaration contains a cause of action in favor of the plaintiff below, against the defendant below. The declaration sets forth, in substance, that in February, 1847, Wall, the defendant below, was director of school district No. 7, in Sandstone, Jackson county; that a teacher was hired, who taught the school in that district, and made out a rate bill for wages due him, and requested Wall to issue his warrant, as director, for the collection thereof, which Wall refused to do; and that thereupon the teacher sued the district and recovered a judgment for the wages so due him, the amount of which judgment was levied upon the taxable property within the district, and collected; that the plaintiff below was a resident of the district, and owned taxable property therein, and that by reason of the premises he was compelled to pay, and did pay, a portion of said judgment, to wit: the sum of eight dollars thereof, which sum he claims to recover of the defendant below.

To this declaration the defendant below demurred, and assigned several special causes of demurrer, all of which, however, embrace but one proposition in substance, namely, that the declaration does not contain a cause of action.

The counsel for the plaintiff below referred to 5 John. R. 175; and 15 *id.* 250; and these are the only adjudged cases cited on either side. The question involved in the case in 5 John. R., referred to, was, whether the imposition of a penalty for official misconduct or neglect of duty, took away the right of action for damages. The law relating to primary schools, and the duties and liabilities of school district officers, in force when the cause of action in this case, if any, arose, was the act of 1843, Sess. L. 1843, p. 88. By the seventy-first section of that act, a penalty of ten dollars was imposed upon every person who, having been elected to the office of moderator, director or assessor of a school district, and having entered upon the duties of his office, should neglect or refuse to perform any duty required of him by virtue of his office. Section 77 provides, that in all cases not otherwise provided for in that act, in which a duty shall be enjoined upon any person, officer, or board of officers, such person, officer or board, as the case may be, shall be liable to any party aggrieved, in the full amount of all damages sustained by the wilful neglect or unfaithful performance of such duty. This last provision introduces no new principle, but is in affirmance of the common law, and seems to have been incorporated into the statute by the legislature, for the purpose of precluding any conclusion to the contrary, which might otherwise be supposed to arise from other provisions of the statute.

In the case of Bartlett v. Crozier, 15 John. R. 254, Mr. Justice Spencer says: "It is a general principle of law, that wherever an individual has sustained an injury by the misfeasance or nonfeasance of an officer, who acts, or omits to act, contrary to his duty, the law affords redress by an action on the case, adapted to the injury." Of the correctness of this doctrine there can be no doubt; and that it is applicable to officers of school districts under the law of 1843, as well as to other officers, scarcely admits of question.

The case of Bartlett *v.* Crozier, was an action for damages resulting from the omission of the defendant, as overseer of highways, to repair a bridge within his district, by reason of which plaintiff's mare fell through the same, and broke her leg, &c.; and the supreme court of the state of New York held that this principle applied in that case, and that the plaintiff was entitled to recover his damages. The defendant removed the case to the court for the correction of errors, where the judgment of the supreme court was reversed—not because the general principle laid down by Mr. Justice Spencer was unsound, but because, in the opinion of the court of errors, which was unanimous, it did not apply to that case. See 17 John. R. 439.

The case of Bartlett *v.* Crozier, differs very essentially from this. In that case the broad question was presented, whether any action could be sustained against the overseer for the injury complained of? In this case the question is, whether the *plaintiff* below can sustain his action? and not, whether *any action* could be sustained against the defendant below, for the damages resulting from the omission of the official duty complained of.

By the second subdivision of section 21 of the act before referred to, it is made the duty of the director, by and with the advice and consent of the moderator or assessor, to contract with and hire qualified teachers *for the district;* which contract is required to be in writing, and to specify the wages per week or month, as agreed by the parties. To this contract the district, in its corporate capacity, is a necessary party, and in that capacity it is bound to perform it: and in case of a failure to do so, is liable in damages to the teacher for its non-performance. The district, in its corporate capacity, receives the moneys apportioned to it from the primary school fund, or derived from other sources, for the payment of teachers; and if more is required for that purpose, it is to be collected from those sending children to the school, in proportion to the number of scholars, and the time they attend. For this purpose, the teacher is to note the daily attendance of each scholar, and make a return of the same to the director. The director is then to ascertain the amount due from each person sending children to the school, and to make out a rate bill, and annex thereto a warrant for the collection thereof, to be signed by him and the moderator.

This warrant is to be directed to the district assessor, who is required to collect all rate bills of the district made and delivered to him in accordance with the seventh subdivision of section 21 of the act aforesaid, in obedience to the command of the warrants annexed to such rate bills, and to make a written return of the same to the director. When such moneys have been collected by the assessor, they are school moneys belonging to the district, and the assessor and his sureties are liable therefor, if not applied by him according to law, upon the bond which he is required to give to the district; and they are to be drawn by an order of the moderator upon the assessor, as moneys to be disbursed by the district, according to section 19 of the act aforesaid. If the moneys so required to be collected, had been lost to the district, by reason of the defalcation of the assessor, after they came into his hands, there can be no question but that the district, in its corporate capacity, might have recovered the amount in an action upon the assessor's bond; and it is equally clear that the members of the corporation could not, in such a case, have sustained actions in their individual names, for their respective portions of the loss.

The converse of the last proposition would be a most palpable violation of that wise maxim, which declares that the law abhors a multiplicity of actions, and which forbids an individual to bring separate actions upon different items of the same account.

How does the case before us differ in principle from the one just supposed, of a loss sustained by the defalcation of the assessor? In that case the loss would fall upon the district in the first instance, in its corporate capacity, and indirectly upon the owners of taxable property within the district. And so in this case. By reason of the refusal of the defendant below to issue his warrant for the collection of the rate bill, the district lost the amount which should have been collected from the individuals sending pupils to the district school, for the payment of the teacher; and was obliged to collect, by a tax upon the property within the district, the amount required; in consequence of which the plaintiff below, being an inhabitant of the district, owning taxable property therein, was compelled to pay a tax of eight dollars, for the recovery of which this suit is brought. If any right of action accrued, it was in favor of the corporation of which the plaintiff below was a member, and not to him individually. If the plaintiff below could sustain this action, every person who paid any portion of the judgment in favor of the teacher against the district, might also sustain a separate action for the amount paid by him; and upon the same principle, in case of the default of a county treasurer, every individual in the county who should be compelled to pay a tax to make good the fund lost, might also maintain a separate action against the treasurer for the amount paid by him. No such principle, it is believed, has ever been sanctioned or recognized by any judicial tribunal whose decisions have been reported in the books.

The result to which the foregoing conclusions lead, does not deprive the plaintiff below of a full and adequate remedy for the injury he complains of. If the defendant below has made himself liable, by the omission of official duty charged in the declaration in this case, a recovery against him by the district will not only make the plaintiff below good, but all the other members of the district who suffered a like injury from the same cause. As the injury to the plaintiff below has been indirect, and sustained by him in common with the other members of the corporation as such, so must be his remedy.

It must therefore be certified to the circuit court for the county of Jackson, as the opinion of this court, that the declaration does not contain a cause of action in favor of the plaintiff below, against the defendant below.

Certified accordingly.

THE PEOPLE v. CARPENTER.

The power to lay out the town of Detroit, given the governor and judges of the territory of Michigan, by the act of Congress of April 26, 1806, entitled "An act to provide for the adjustment of titles to land in the town of Detroit, and territory of Michigan, and for other purposes," was fully executed by the governor and judges on 27th April, 1807.

A flight of stairs, fifteen feet high and three feet eight inches wide, within the limits of Woodward Avenue, in the city of Detroit, leading from the ground to the second story of a building standing on the line of the street adjacent to the stairs, is an obstruction of the street not authorized by the acts of the governor and judges of the territory of Michigan, of the 18th May, 1807, and 7th November, 1815, nor by the ordinances of 1836 and 1842, of the common council of the city.

Every obstruction in a street or highway is not a nuisance.

Whether an obstruction in a street or highway, is or is not a nuisance, is a question of fact to be found by a jury, and not a question of law.

Neither the governor and judges of the territory of Michigan, nor the common council of the city of Detroit, had, or have, any power or authority to grant the exclusive use of any of the streets or alleys of the city to individuals.

CASE reserved from the District Court of Wayne county.

At the September term of the district court, in 1845, the following indictment was found against Carpenter for obstructing Woodward Avenue in the city of Detroit:

"*Wayne county, ss:*—The grand jurors of the people of the state of Michigan, inquiring in and for the body of the county of Wayne aforesaid, upon their oaths present, that on the first day of January, in the year one thousand eight hundred and twenty-three, was, and from thence hitherto there hath been, and still is, a certain common and public highway, commonly called Woodward Avenue, leading from a certain place in the city of Detroit, in the county of Wayne aforesaid, commonly called the Grand Circus, to a stream of water in the city of Detroit aforesaid, commonly called the Detroit river, for all the citizens and inhabitants of the state of Michigan aforesaid to go, return, pass and repass, ride and labor, on foot and on horseback, and with their horses, coaches, carts and carriages, in and along the same, at their free will and pleasure, without any obstruction, hindrance or impediments.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that William N. Carpenter, late of the county aforesaid, afterwards, to wit: on the first day of January, one thousand eight hundred and forty-four, with force and arms, at Detroit in the county of Wayne aforesaid, and within the jurisdiction of this court, in and upon the aforesaid common and public highway, unlawfully and injuriously made, placed, built and erected, and caused to be made, placed, built and erected, divers steps made of stone, iron and other materials, of great height and width, to wit, the height of fifteen feet, and the width of four feet, and also a certain erection composed of stone, iron and other materials, of the same height and width aforesaid, and by the same steps and erection encroached upon, stopped up and obstructed a certain part of the aforesaid common and public highway, for a large space thereof, to wit, for the space of four feet in length and four feet in width; and the same part of the common and public highway aforesaid so encroached upon, stopped up and obstructed, he, the said William N. Carpenter, upon and from the said first day of January aforesaid, until the day of the taking of this inquisition, with force and arms at Detroit aforesaid, and within the jurisdiction of this court, unlawfully and unjustly hath continued and still doth continue, whereby the citizens and inhabitants of the state of Michigan, during all the time last aforesaid, could not, nor can they now, go, return, pass and repass, through, over and along the aforesaid common and public highway, on foot and on horseback, and with their horses, coaches, carts and carriages, as they were used and accustomed to do, and ought to have done and to do; but during all the time aforesaid have been and are greatly obstructed and hindered in the use and enjoyment of the said common and public highway, to the great damage and nuisance of all the citizens and inhabitants of the state aforesaid, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Michigan."

To the indictment the defendant plead not guilty, and on the trial the jury returned the following special verdict: That, pursuant to the act of congress passed the twenty first of April, eighteen hundred and six, the governor and judges adopted a plan and laid out the city of Detroit, on the thirteenth and twenty seventh days of April, eighteen hundred and seven, including the road or avenue in such city known as Woodward Avenue, being one hundred and twenty feet in width, and extending from the Detroit river to the Grand Circus in said city; and from that time to the present the road or avenue so laid out has been used and travelled as a highway: that William N. Carpenter did erect and since has continued, as charged in the indictment, on the side-walk, within the limits of said Woodward avenue, a flight or pair of steps composed of stone and iron, fifteen feet in height and three feet eight inches in width, adjacent to and opposite a lot owned by said Carpenter, with a brick pavement under and around them, and that said steps adjoin the building erected on said lot, owned by defendant: that in the year eighteen hundred and six, James Abbott erected a house on said street; that also one Curry erected a house on the corner of said Woodward and Jefferson avenues, on the westerly side of said Woodward avenue; that one Godfrey erected a house on the opposite side of said Woodward avenue, in eighteen hundred and six; that one Smith erected a house on said Woodward avenue; also one Scott erected a house adjacent to said Smith, in rear of said Curry's house, in same year; all of said houses except the last were built on the line of said avenue: that in front of said Smith's house was a platform extending the whole front of the house and projecting in the street some eight or twelve feet; (some years afterwards said platform was changed into a gallery with a roof): that in front of Godfrey's house there was built a portico, with a roof extending into the street six or eight feet, and in height twelve or eighteen feet: that there was a fence in front of the Scott house, projecting some feet into the street: that Abbott placed before his house, in eighteen hundred and sixteen, a similar fence, extending ten feet into the street. No other houses were built until after the city was laid out as aforesaid, but that similar and other erections were subsequently made in other parts of the city, as the taste of the owners suggested, extending into the street: that said steps mentioned in said indictment are adjacent to the lot where the said house of said Curry was built: that on that part of Woodward avenue there were two or three steps in that street, ascending to the ground floor of Curry's house or store: that as early as the period when said houses and projections were built, the lines or boundaries of said Woodward avenue were well understood, and were the same as those which now are the lines or boundaries of said avenue: that the said houses were intended to be built on said lines or boundaries, except said Scott's: that said porticoes, platforms and projections should be in the street. They find, also, that various ordinances have been from time to time passed by the authorities of the city of Detroit relative to sidewalks and projections, and spaces in the streets of said city: all of which shall be deemed to be and taken as a part of this special verdict. If upon these facts, under the laws of the state and the said ordinances of the city of Detroit, the court shall be of the opinion that the said steps are a nuisance, then the jury find the said defendant guilty, otherwise not guilty.

The prosecuting attorney moved for judgment on the special verdict, which motion was reserved by the district court for the opinion of this court.

Joy, for The People.

Barstow and Lockwood, for defendant.

By the court, WHIPPLE, Ch. J. By the act of congress of April 21, 1806, entitled "An act to provide for the adjustment of titles to land in the town of Detroit and territory of Michigan, and for other purposes," the governor and judges of the territory of Michigan, or any three of them, were authorized to lay out a town, including the whole of the old town of Detroit, &c.

The first question which naturally presents itself, is, whether the authority thus conferred was ever executed? To determine this question, we must necessarily refer to the acts of the governor and judges; and it is fortunate that the records of those acts have been preserved through a period of more than forty years, and bear on their face the stamp of verity.

Let us now trace, by these authentic records, the various acts of those high public functionaries, in execution of the trust committed to them by the act of 21st April, 1806.

On the first page of the record of their proceedings, is to be found the act of congress; then follows the proceedings of the board at their first meeting on the 6th September, 1806. At this meeting, a committee, consisting of Judge Woodward, was appointed, "to take into consideration the subject matter of the said act." On the 8th September, Judge Woodward made a report, when the following among other resolutions were adopted:

1. "*Resolved*, That it is expedient immediately to lay out and survey a town, under the said act of Congress, and to adjust the titles and claims to lands and lots therein."

2. "*Resolved*, That the basis of the said town be an equilateral triangle, having each side of the length of 4,000 feet, and having every angle bisected by a perpendicular line upon the opposite side; such parts being excepted as, from the approximation to the river, or other unavoidable circumstances, may require partial deviations"

On the 5th November, 1806, resolutions were adopted by which a general system was provided for numbering the different sections of the city of Detroit, and also for numbering the lots in each section. On the 14th of November, the resolution respecting the numbering of the sections, was rescinded. On the 13th April, 1807, the surveyor having presented to the board a plan of sections 7 and 8, the board, on motion of Judge Woodward, resolved, "that the said plan of section 7 be confirmed, and the same be a public record, and that it remain with the secretary of the governor and judges, and that no person be suffered to make any alteration without their order to that effect." On the same day, it was ordered, "that the surveyor make a plan of the section numbered three, to be a record; and that a committee be appointed to superintend the said plan." On the 14th April, it was ordered, "that the surveyor be directed to prepare a plan of the sections numbered one, four, two, six, three, nine and ten, under the direction of the committee, to be kept as a record when approved." On the 16th April, it was resolved, "that the plan of section numbered seven, adopted on the 13th April, be signed by the governor and the judges, or some one or more of them in identification, and be attested by the secretary of this board." On the 27th April, it was resolved, "that the plan of the sections numbered 1, 2, 3, 4, 6 and 8, be confirmed and be a record, and that they be signed by the president of the board, and be attested by the secretary in identification; and that no alteration be suffered therein without an order of the governor and judges to that effect." On the 22d May, a committee was appointed to bring in a bill concerning the naming of streets.

An examination of the original plans of sections 1, 2, 3, 4, 6, 7 and 8, shows that they were authenticated in the manner prescribed by the resolutions of the 13th and 27th April. On the 18th May, 1807, the governor and judges passed an act entitled "An additional act concerning the town of Detroit." This act provides, among other things, that in the avenues of the town a space of ten feet shall be allowed contiguous to the front lines of lots on each side, for the purposes of erecting porches in front of houses, doors of cellars, for an area to allow lights in apartments below the level of the ground, for a grass plat or shrubbery, and for other purposes of utility or ornament, as the proprietor or lessee of the proprietor may direct.

In November, 1815, the governor and judges passed another act, limiting the erections, authorized by the act of May, 1807, to fifty inches in height. In the revised ordinances of 1836 of the city of Detroit, a space in front of the established line of all streets is allowed for projections: provided, the space shall either be enclosed or paved with flat or round stone or brick; and that upon streets 120 feet wide, such space shall be allowed to extend seven feet from the established line, &c. The revised ordinances of 1842, after establishing the width of side walks within the limits of the city, provide, that "on streets of the width of 120 feet and upwards, any projection shall not extend more than seven feet."

I have thus briefly noticed the several acts of the governor and judges, as well in relation to the execution of the power vested in them by the act of 1806, as those which relate to the spaces allowed the owners of lots contiguous to the front lines. A correct knowledge of these last acts becomes necessary, in consequence of the conflicting views taken by counsel of their effect and bearing on the important questions raised in the case, and upon which the judgment of this court is to be pronounced. For the sake of convenience, I have also referred to such ordinances of the common council as authorize the use of such spaces.

It was contended by the counsel in behalf of the people, that the powers of the governor and judges, in relation to the plan of the city, were exhausted on the 27th April, 1807. On the other hand, it is contended that those powers continued until the 18th May, 1807; and that the act passed on that day was in fact the dedicatory act. It may be admitted that, until the town of Detroit was actually laid out by the governor and judges, any of their previous acts, in the prosecution of that duty, might be the subject of revision and alteration. For instance, the basis of the town of Detroit was laid down by a resolution adopted as early as the 8th Sept. 1806. If, in the progress of their labors, it had been discovered by the board that such a basis was either impracticable or inconvenient, it would have been competent for them to modify it, before the final act of dedication. It appears that on the 18th April, 1807, section 7 received the final action of the board, so far, at least, as to determine its form and extent, and the streets, areas and lots within it. The other sections appear to have been confirmed on the 27th day of the same month. Do the transactions of the board on those days furnish evidence from which it may be inferred that the trust had been fully executed? In the first place, it appears, from an inspection of the plans of the various sections, that they were laid out according to the basis prescribed as early as September, 1806. Secondly, they exhibit on their face streets, alleys, open spaces or areas, and are subdivided into lots of convenient size: they also indicate the means for determining the sides of the sections, the width of the streets and alleys, and their courses; the dimensions of the open spaces or areas: the lots also are numbered, according to the plan prescribed by the resolution of 5th November, 1806. Nothing further was necessary to render the various sections complete; so that, when transferred and arranged on paper, according to the basis previously adopted, the plan of a town, perfect in itself, would be exhibited. No explanation, extrinsic the plan, would be necessary to show the purposes for which the different spaces were intended. For example, the two exterior lines on each side of the sections, indicate with sufficient certainty that broad avenues were intended; the open areas in the centre indicate with like certainty for what they were intended. Viewing these facts in connection with the other acts of the board, as they appear in the records, and the conclusion seems irresistible, that the town was laid out on the 27th April, 1807. What more solemn form could the board have adopted, to make known their intentions, than the resolution adopted by them on that day? The sections, as reported by the surveyor, were "*confirmed*;" they were ordered to be made matter of "*record*," and to be "*signed by the president of the board and attested by the secretary in identification.*" On that day, they were signed by the president and attested by the secretary. What words more expressive or significant could have been used to convey the idea, that the board considered that the trust committed to their hands had been executed? What more solemn form of dedication could have been devised? The plan of the town was the offspring of the comprehensive but somewhat erratic mind of the presiding judge of the supreme court: that he was proud of that offspring is well known; and the same anxious care which he manifested in its formation, seems to have exhibited itself in the means adopted to preserve it from the hand of innovation in its maturity. It is true, that the streets do not appear to have been designated by name: this, however, was not necessary. That certain spaces were intended for streets, is obvious from inspection.

I am unable to appreciate the force of the reasoning by which the act of May, 1807, is to be considered as the act of dedication. Its chief object seems to have been, to allow certain spaces contiguous to the front line of lots for purposes of utility or ornament; to define the width of side walks; to provide means by which the health and beauty of the town might be promoted, and to designate the purposes to which the internal space of ground in the middle of each section was to be devoted. It does not purport to be the act of the governor and judges in their special character of commissioners charged with the execution of a particular duty; on the contrary, it assumes all the *forms* of a law, and clearly indicates that it was passed by them in thier *legislative* capacity. The title, the enacting clause, the signatures of the governor and judges, the attestation of the secretary, all combine to show that it was an act of legislation: that they were executing the powers which appertained to them as a legislative body, and not those of commissioners. To attribute to that act the character assigned to it by counsel, would be to argue on the part of the governor and judges a degree of ignorance in respect to their functions, utterly inadmissable.

Beside, the body of the act contains matter which would seem to be conclusive of the question. The first section provides, " that in the avenues of the *town* or *city* of Detroit, there shall be a space of ten feet contiguous to the front line of *lots*, for the purpose of erecting porches, &c. The second section allows ten feet, contiguous to the ten mentioned in the first section, for a walk for the accommodation of persons passing on foot, &c. The third section provides, at a distance of twenty feet from the line of the lots, on each side of the avenues, running N. 30 deg. E., N. 60 deg. E., N. 30 deg. W., and N. 60 deg. W., shade trees should be planted, &c. The fourth section directs the mode of planting trees on streets having a north and south, and east and west direction. The fifth section provides, that in streets of the width of sixty feet, seven feet shall be allowed for porches, &c. By section six, the squares or other spaces of ground where six avenues intersect, and those spaces where twelve avenues intersect, were to be planted with trees, &c. Section seven declares the purposes for which the internal spaces of ground, in the middle of each section, were reserved. The eighth section, in order to secure regularity and beauty in carrying into execution the act, imposes upon the surveyor a duty.

This analysis of the act shows, very conclusively, that its provisions were made and intended for a town actually laid out, and not one in embryo. It refers to lots, to streets of a particular width, to avenues having a certain course, to squares where six avenues or twelve avenues intersect, to internal spaces within each section, &c. Now, such language presupposes a town actually laid out, and to which it can be properly applied. We must, then, refer to the 27th April, 1807, as the day on which the act of dedication took place.

The next question to be determined is, whether the legislation by the governor and judges, and by the common council of the city of Detroit, reserving to the owners of lots, spaces contiguous to their front lines, was valid; or whether it does violate public rights flowing immediately from the act of dedication. The nature and extent of those rights are, at this day, well understood. A series of judicial decisions made in this country and in England during the last forty years, have defined with great accuracy the rights of the public and of individuals to grounds reserved for public use in a town or city. The extent to which municipal corporations may go in *regulating* the use of grounds dedicated to the public, are also stated with clearness and precision. From the view, however, which I have taken of the question now being considered, I deem it unnecessary to refer to those adjudications for the purpose of testing the validity of the act of May, 1807, and subsequent acts, either of the governor and judges or of the common council, in relation to the spaces of ground allowed to owners of lots and contiguous to their front lines.

Assuming, then, the act of May, 1807, as the lawful exercise of legislative power, let us examine it, with a view to determine how far the defendant can justify the erection complained of, by its provisions. By the first section of the act, ten feet was allowed "for erecting porches in the front of houses, for doors of cellars, for an area to allow light to apartments below the level of the ground, for a grass plat and shrubbery, or for other purposes of utility or ornament, as the inclination and taste of the proprietor may direct."

The right to erect a flight of steps from the street to the second story of a building, is not enumerated in the section. It must rest, then, on the concluding and general words of the section, "or, for other purposes of utility or ornament." But can such a right be deduced from these general words? This can be determined by the application of a few general rules, by which courts are guided in the construction of statutes.

First: what was the intention of the law makers. Upon the ruins of the ancient town of Detroit—a town covering a small space of ground, with narrow streets—was projected another, covering a much larger space, and distinguished, among other things, for the width of its streets, and its magnificent avenues. The town being laid out, its founders proceeded to carry out other objects they had no doubt in contemplation, and provide measures as well to promote the comfort, convenience and health of its inhabitants, as to beautify and adorn it. These objects were sought to be attained by the act of 18th May, 1807. The side-walks of Woodward avenue being twenty feet wide, ten of those twenty feet were allowed to be used for purposes coming within the purview of the act. The governor and judges assuming that they had the right, allowed porches to be erected. These constructions, it was supposed, would not only contribute to the comfort and convenience of the citizens, but add, if attention was paid to architectural taste, to the beauty of the town. Doors for cellars, if properly placed, while they could not interfere with the public uses to which the street was dedicated, might prove a great convenience: as a means of allowing light to enter apartments below the surface of the ground, it might be defended on the ground of both health and convenience: its use as a grass plat or for shrubbery would obviously contribute to the health and comfort of the inhabitants, and to the beauty of the city.

Are we permitted, then, to give to the concluding words of the section such a latitude of interpretation as to allow these spaces to be used for purposes inconsistent with the object the law makers had in view? Clearly not. Would it, then, be consistent with the intention of the law makers to allow these spaces to be used for erections like that described in the special verdict in this case? It might, in one sense, be deemed convenient to appropriate these spaces for such purposes; for owners of lots would reap all the pecuniary advantages to be derived from the use of the second story, without diminishing the size of the rooms below. But these spaces were never intended to be used for such purposes. If they were tolerated, what would be the consequences? Why, the business streets of this city, where land has attained a great value, would present, along their entire line, flights of stone steps from the street to the second and third stories of buildings. "Utility," in such a state of things, would hardly be combined with "beauty." Such an inconvenience to the public never could have been intended by the law makers, and never would be tolerated by the public.

But according to a well established rule of construction, the general words "utility or ornament," in the latter part of the section, are to be construed with reference to the particular words which precede them, they may be enlarged or restrained in their meaning, so as to make each part of the section consistent with every other part; this is but another mode of arriving at the intention of the law maker.

For the purposes of ornament, the spaces are authorized to be used for a grass plat or for shrubbery: the word "ornament," then, is to be so construed with reference to the *kind* of ornament specially enumerated—it would not justify the use of those spaces for purposes of ornament not fairly deducible from the words, "grass plat or shrubbery." The same rule will apply in giving a construction to the word "utility." The legislature, in the previous part of the section, have indicated what they intended by the use of that word; and it must be controlled and limited in its meaning by the various objects of utility specified in the section. For instance, a *porch* is authorized. Now, it is not contended that the owners of lots are confined particularly to erections called porches: any other erection of a similar nature, and used for similar purposes, would fall within the meaning of the word *utility*.

At all events, the erection must bear a nearer relation to a porch, than the flight of steps described in the special verdict. I think it is fair to conclude that the objects of utility or ornament authorized by the law are such, and such only, as may contribute to the convenience, comfort or health of owners of lots, provided they do not annoy the public or mar the beauty of the city.

The act of 1807 continued in force until the 7th November, 1815. The erections authorized by the first section of the former act, were limited by the latter act to fifty inches in height, except as to "a porch or gallery." The act also provided, that "every person placing a fence or paling, not exceeding fifty inches in height, on the front line of the ten feet, shall also place another fence or paling on the rear line of said ten feet, along the line of his lot, of at least equal height; and the said ten feet shall not be severed from the street, but the same shall always be considered public ground, notwithstanding the uses that now are, or hereafter may be, permitted to be made thereof: and these regulations shall also apply to the seven feet allowed by a subsequent section of said act, in relation to narrower streets. And the common council of Detroit may, at any time, make additional provisions for the effecting the object of this law: Provided, that no laws that are or may be passed on these subjects, shall ever confer any vested right or title, or in any manner impair the public authority to regulate the said ten feet or seven feet, as may be found expedient."

If any doubts existed as to the correctness of the views I have expressed upon the question now under consideration, this act would remove them. It repels the idea suggested by counsel, that the law of 1807 was the dedicatory act. The first section of the act of 1815 refers to the "ten feet *regulated* by the first section of an act entitled 'An additional act concerning the town of Detroit,'" passed May 18, 1807. It is manifest, then, that the act of 1807 was merely intended to *regulate* the use of the streets in a town *already* laid out and established. It is a legislative construction of the act of that year, which, in a doubtful case, would be conclusive upon us. That it was intended to *vest rights* in the proprietors of lots, is repelled by the language of the first section of the act of 1815. The governor and judges had probably discovered, that what was originally granted as a boon, had in process of time come to be considered as having ripened into a *right*. The evil consequences of such a doctrine were foreseen, and hence the clear, strong, and explicit terms in which it was repudiated.

This concludes the legislation of the governor and judges on this vexed question. It is probable that the acts of 1807 and 1815 were regarded as binding and obligatory by the local authorities of the city. Under either the latter act or the general powers conferred upon the common council by the charter of the city, that body, in the revision of 1836, limited the space allowed for proprietors to *seven* feet, in streets of the width of 120 feet. As a condition to the use of such spaces, however, they were required to be "enclosed or paved with flat or round stone or brick." The ordinance of 1842, entitled "An ordinance relative to side-walks," provides in the second section, that "on streets of the width of 120 feet and upwards, any projection shall not extend more than seven feet, except Washington avenue, which shall not exceed ten feet."

These ordinances are to be construed with reference to other laws or ordinances on the same subject matter. Neither of them specifies the purposes for which the spaces allowed by them respectively should be used. We can account for this circumstance only upon the supposition that the acts of 1807 and 1815 were regarded as in force. The ordinance of 1836 provides that such spaces "shall either be enclosed or paved with flat or round stone or brick," &c. Such language is inapplicable to a space used for a projection like that complained of. But this ordinance was repealed by the ordinance of 1842, which does not confer, in absolute terms, a right: it simply provides that "any projection shall not extend more than seven feet." This language would seem to imply that the right to these spaces was already conferred, and that the object of the provision was merely to restrict it to seven feet. This view is fortified by the terms of the third section, which provides that "that part of the respective side-walks lying outside of the line, to which projections as aforesaid are *allowed* to extend, shall not be obstructed or encumbered."

Assuming that the common council acted with reference to the acts of 1807 and 1815, we are enabled to account for the language employed in the ordinance of 1842. While it reduces these spaces in streets of the width of 120 feet, to seven feet, it is entirely silent as to the uses to which they might be devoted. We can only account for this omission on the ground that this was supplied by the act of 1807, as modified by that of 1815. We cannot suppose that the common council would grant the use of ground, included in one of the most important streets, in a commercial point of view, in the city, without so guarding the grant as to protect the public from inconvenience.

As the erection in question, then, is not justified either by the acts of 1807 or 1815, assuming those acts to be yet in force, or by the ordinances of the city, of 1836 or 1842, we are to regard the steps as an obstruction in a public highway, without any legal authority; and the only remaining question to be determined is, whether the special verdict contains such a statement of facts as will authorize us to give judgment against the respondent.

Chancellor Jones, in an elaborate and very able opinion in the case of Seward *v.* Jackson, 8 Cowen 406, says: "It is of the essence of a special verdict, that it should be a finding by the jury of the facts on which the court is to pronounce the law, and not the evidence of the facts upon which it is the province of the jury to adjudicate." The court applies the law to the facts, but have no power to decide upon evidence: this is the province of the jury. These rules lie at the foundation of our system of jurisprudence, and should be kept steadily in view; otherwise we are in danger of blending two jurisdictions which are entirely distinct.

The rule laid down by Chancellor Jones is sustained by the elementary works on practice. Tidd, 897-8, says: "It is a general rule, that in a special verdict, as nothing is to be intended, the jury must find facts, and not merely the evidence of facts." Again: "And if a special verdict, in a mixed question of law and fact, find facts, from which the court can draw clear conclusions, it is no objection to the verdict, that the jury have not themselves drawn such conclusions, and stated them as facts in the case."

In the case before us, the material facts found by the jury are: 1 That the governor and judges, pursuant to the act of congress of April 21, 1806, adopted a plan and laid out the city of Detroit, on the 13th and 27th of April, 1807, including the road or avenue known as Woodward avenue: 2, That from that time to the present, the road or avenue has been used and travelled as a highway: 3, That the defendant did erect on the side-walk, within the limits of the said avenue, a flight of steps fifteen feet high and three feet eight inches wide: 4, The jury also find that various ordinances have been passed by the city authorities in relation to side-walks, projections and spaces in the streets of said city, all of which they make part of their verdict. The jury then conclude as follows: "If upon these facts, under the laws of the state and the said ordinances of the city of Detroit, the court shall be of the opinion that the said steps are a *nuisance*, then the jury find the defendant guilty; otherwise not guilty."

Can the court pronounce judgment upon such a finding? A nuisance is defined by Blackstone to be, "the doing of a thing to the annoyance of the king's subjects." 4 Black. Com. 167. In the case before us, the *thing done* was the erection of the steps mentioned in the verdict: whether *the thing* thus done *is an annoyance* to the inhabitants of this state, is referred by the jury to the determination of this court.

There are a class of cases where the finding of a jury in respect to *the thing done*, necessarily includes the other fact: thus, if a person be indicted for keeping a house of prostitution, or a gambling house, and the jury find the fact, the law implies the other fact. And this necessary legal inference is founded on the idea, that from their very nature a house of prostitution and a gambling house cannot be otherwise than an annoyance to the public—a nuisance. The same rule would apply to an indictment against a common scold, or for creating noxious smells.

In all these and the like cases, the indictment need not aver the fact of annoyance; or, if averred, it need not be expressly proved; the conclusion of law supplying the place of such proof. This conclusion of law, however, can only apply to cases where it must, from the nature of things, be universally correct.

Ordinarily, an indictment for a nuisance cannot be supported unless the thing complained of is productive of inconvenience to the public. Thus in an indictment for obstructing a highway, the forms of the indictment given by the elementary works always contain three averments: 1, that there exists a public highway: 2, that it was unlawfully obstructed: and, 3, *that by reason of the obstruction, persons could not pass and repass as they were accustomed*," &c. The prosecutor, in such cases, must prove *these facts to the satisfaction of the jury before he can ask a conviction*. Arch. Cr. Pl. 482. This *inconvenience* or *annoyance* to the public enters into the definition of the offence, *and must in all cases be proved.*

These positions are not questioned by the counsel who represents the people; but it is contended that the question of inconvenience is a question of law, arising from the facts stated in the special verdict: that the jury having found that Woodward avenue is a highway, and that the defendant erected a flight of steps, the court can arrive at a certain conclusion respecting the question of annoyance: in other words, that such an obstruction must necessarily be an annoyance to the public.

But to warrant this position, it would seem necessary to establish another,—that every obstruction in a highway is a nuisance. The reasoning of counsel is, that the public have a right to the use of every part of the highway; and, having this right, any obstruction must be a nuisance. As a general legal proposition, it is true that the public have a right to use every part of a common and public highway; but it by no means follows, that *every obstruction is necessarily a nuisance.* The entire line of Jefferson avenue exhibits obstructions, some of which may present as serious obstacles to the use of the whole of the highway, as the steps in question. Trees, awning-posts, hay-scales and hydrants meet the traveller at every step, and yet no one regards them as nuisances. It may be said that the health or convenience of the public is promoted by such erections. This is very true, but in determining whether an obstruction in a highway is a nuisance, the advantages or disadvantages to the public are not to be taken into the account in determining the question of guilt or innocence.

But let us test the correctness of the theory of counsel by other examples. It is common for individuals to erect platforms in front of their residences, to subserve their convenience in getting in and out of carriages. Suppose a person indicted for obstructing the highway, and the obstruction should consist of one of these platforms, which are reached by steps, and are usually two or three feet high, and three feet wide: would the prosecutor deem it safe to rest, after proving the existence of the highway and the obstruction? It is apprehended that he would not, and that further proof would be required to show that the *obstruction* was an annoyance to the public. On the trial of such an indictment, it would be entirely competent for the defendant to introduce proof showing that, from its position, the erection did not and could not annoy the public.

Now, such erections oppose as effectual a barrier to the traveler as the steps in question; yet it could hardly be contended that the legal presumption of annoyance to the public would be so conclusive as to preclude the possibility of its being overthrown by proof. Again: in streets where the principal commercial business of the city is transacted, and which are most likely to be thronged with people, obstructions of various kinds are to be found, such as signs, projecting windows, and the like; and where the ground descends, as from Jefferson Avenue to the river, large stone steps are placed in front of doors to facilitate an entrance. It is conceived that such obstructions are not considered, in law or in fact, as nuisances; and yet, the use of the streets where such projections exist are as effectually obstructed as Woodward Avenue is by the steps in question.

These illustrations show that the rule sought to be enforced, that every obstruction in a highway is a nuisance, cannot be sustained. Whether an obstruction be a nuisance, must, then, be a question of fact for a jury, and not of law for the court. It may be that the steps in question furnish strong and almost conclusive proof that the rights of the public are violated: if so, a jury, under proper instructions from a court, would so find.

In the case of Hart *v.* Mayor &c. of Albany, 3 Paige 218, Chancellor Walworth uses this language: "The question of nuisance or no nuisance, however, is always a question of fact, in relation to which the opinions of individuals will necessarily differ." In the same opinion, the chancellor asserts, that "*prima facie* the person who appropriates any part of a public street or harbor exclusively and permanently to his own use, without the consent of the legislature or the municipal authorities, is guilty of a nuisance; and he subjects himself to the burden of proving that it is no injury to the public, and that a public right has not been violated."

I am unable to reconcile these views: if the question of nuisance or no nuisance be a question of fact, it properly belongs to a jury to determine that fact. But, according to the clause in the opinion of the chancellor, last quoted, any person who appropriates a part of a street permanently to his own use, is, *prima facie*, guilty of a nuisance: that is, the obstruction being proved, the law presumes a violation of public right. How can such a rule be sound, if, in the language of the chancellor, the question of nuisance or no nuisance be one, "in relation to which the opinions of individuals will differ."

The definition of a nuisance necessarily implies annoyance or inconvenience to the public: this annoyance or inconvenience is the ground of complaint, and is a question of fact; if so, the burden rests on him who makes the complaint to prove the fact. If the fact is to be presumed on proof of the obstruction, then every obstruction must necessarily be a nuisance; but I have endeavored to show that every obstruction in a highway is not necessarily a nuisance, and if I have been successful in establishing this proposition, then there is no foundation on which the legal presumption can rest. It is very true, the chancellor does not consider the presumption arising in the supposed case absolute and conclusive, but liable to be overthrown by proof to the contrary. The burden of proof is merely changed; but even this view cannot be sustained unless it be *universally* true that every obstruction placed in a highway is a nuisance: and that cannot be universally true in relation to which men may reasonably entertain different opinions. Presumptions, in such cases, must be presumptions of fact, and, in the language of Lord Mansfield, "the court cannot presume a fact."

The true rule on this subject, is, that where the act done is in its own nature an offence, no consequences need be averred in the indictment; but where the act done is not in its own nature an offence, consequences must be stated and proved. The cases to which the law applies the *presumptio juris et de jure*, are fully stated and reviewed in the case of Tanner *v.* Trustees of Albion, 5 Hill 121.

A brief review of some of the cases cited by the counsel for the people, in support of the rule, that an obstruction being once proved to be in a highway, the injury to the public follows as a *necessary presumption of law*, will conclude this opinion.

In the case of Arundel *v.* McCulloch, 10 Mass. 71, it appeared that a bridge was erected across an arm of the sea, and that the defendant, to facilitate the passage of a vessel, removed it, doing as little damage as possible to effect his purpose. The court held, that the defendant was not liable in trespass, as the arm of the sea was a public highway, and no authority had been granted to obstruct its navigation by a bridge; and that "when any public way is *unlawfully* obstructed, any individual who wants to use it in a public way, may remove the obstruction." The *unlawfulness* of the act was shown by the fact that the defendant could not navigate the river in consequence of the obstruction. This case, then, does not prove the rule laid down by counsel.

The case of Pierce *v.* Dart, 7 Cowen 609, shows, that in an action for obstructing a highway, the plaintiff is bound to show that he sustained some injury.

The case of Hart *v.* Mayor &c. of Albany, 9 Wendell 571, contains noting inconsistent with the views I have expressed. Mr. Justice Sutherland, in the course of his opinion, uses the following language: "This float, if permanently moored and continued in the open part of the river, *thereby rendering the navigation less safe and convenient*, would, I apprehend, most clearly be a public nuisance, liable to be indicted as such, or to be abated without indictment by any individual who might be injured or aggrieved by it. It certainly is not less a nuisance, if the views I have expressed are correct, for being placed within the basin." Again: "If the complainants can moor a *floating store house* in the basin, it is not perceived why they may not erect a more permanent building, with its foundation in the bottom of the basin. It is very immaterial to the public how far either below or above the surface of the water the obstruction reaches: *it impedes the navigation*, or other use of the basin, neither more or less on that account." These views are warranted by the case made by the answer, which showed, in contradiction of the bill, that the float was *an obstruction to the free navigation of the basin.*

In the case of Rex *v.* Russell, 6 East. 427, it appeared on the trial, that the wagons mentioned in the indictment occupied one half the street, "so that no carriage could pass on that side next the warehouse, though two carriages might pass on the opposite side, the gutter being in the middle of the street; that the wagons were loaded and unloaded in the street, and the packages thrown down on the same side of the street, so as frequently, with the wagons, to obstruct even foot passengers, and oblige them to cross the gutter to the other side." These being the facts proved on the trial, a verdict of guilty against the defendant was sustained. The court say, "that the primary object of the street was for the free passage of the public: and any thing that impeded that free passage without necessity, was a nuisance." The *free passage* of the street having been shown by the facts on the trial, *as well as the inconvenince* to which the public had been subjected, no question could arise as to the correctness of the verdict.

The same remark applies to the case of Rex v. Cross, 3 Camp. 227. *It was proved* on the trial, that, by the acts of the defendant, "private carriages could very rarely be drawn up to the opposite houses, and considerable difficulty was experienced in passing along that side of the street." The annoyance, therefore, to the public was manifest, and no doubt could be entertained of the legality of the conviction.

In Rex v. Russell and others, 13 Eng. C. L. 254, the defendants were indicted for a nuisance in a navigable stream. The majority of the court held, that if the erection was for a public purpose, and produced a public benefit, and if the erection was in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, then the defendants ought to be acquitted. From this opinion, Lord Tenterden dissented, and held, that the questions submitted to the consideration of the jury were not raised by the indictment: that the question properly arising was, "whether the navigation and passage of vessels on this public river (Tyne) was injured by the erections? upon this question there was evidence on both sides," &c. If this opinion be correct, as I think it was, it is quite clear that proof of the erection, in and of itself, would not furnish sufficient evidence to support the indictment, unless accompanied by other proof, *that the navigation and passage of vessels on the river was injured.*

In the case of King v. Ward, 31 Eng. C. L. 92, the rule is explicitly recognized, that the question of nuisance or no nuisance is a question of fact for the jury. Lord Denman, in the course of his opinion, after quoting from a remark of Lord Hale, that "all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment," observes: "There is no incongruity in his (Lord Hale) afterwards asserting that the question of nuisance or no nuisance is for the jury: so Lord Tenterden considered it in Rex v. Russell, and gave the form in which he thought it ought to be submitted to them; and that is precisely the course taken on the trial of this indictment." From the report of the case, it appears that the jury, after deliberation, stated that *an impediment had been created;* with this, however, the chief justice was not satisfied, for the reason that such a finding "was not equivalent to the word nuisance:" whereupon the jury "said at length that they considered it to be a nuisance."

The case of the Commonwealth *v.* Wilkinson, 16 Pick. 175, does not raise the question I am now discussing. The only question raised in that case was, whether the defendant, who was indicted for continuing certain buildings within the limits of the highway, could show that that portion of the road covered by the buildings was not within the traveled part thereof. Of the correctness of the ruling of the court there can be no doubt. No person is authorized so to appropriate any portion of a highway, as to interfere with the rights of the public.

In the case of Hopkins *v.* Crombie, 4 N. H. Rep. 520, the supreme court of New Hampshire, in considering the question, whether every encroachment on a highway is *ipso facto* a nuisance, held that "the question whether anything within the limits of a highway is to be deemed a nuisance, is a question of fact, to be settled by a jury."

The case in 2 Watts' R. 23, was referred to as sustaining a contrary doctrine. I have examined that case, and am unable to perceive how it conflicts with the case of Hopkins *v.* Crombie. A building had been erected on a public square; and in the course of their opinion the court say: "The points, then, in this cause may be narrowed down to a question of fact. For if the jury believe, from the testimony, that these buildings were erected on the public square, although their limits and extent have not been precisely defined, they are a public nuisance."

Looking to the purposes for which public squares are usually dedicated to the public, it would seem to be a necessary conclusion, that the erection on such squares of "a stable and shed," would be a nuisance. All that can be gathered from the case, however, is, that upon the trial of a cause, it would be the duty of the court so to instruct the jury, who, after all, determine the question of nuisance or no nuisance.

The case of the Commonwealth *v.* Passmore, 1 Serg. & Raw. 217, is more in point; and that it sustains fully the principle for which I contend, will appear by quotations from the opinion of the learned chief justice. He says: "The defendant has been indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city, and suffering them to remain for the purpose of being sold there, *so as to render the passage less convenient*, although not entirely to obstruct it."

It is a fair inference, then, that if the acts of the defendant had not the effect to "render the passage less convenient," he would not be guilty of a nuisance.

The case of the State *v.* Caldwell, 2 Speer's R. 163, would come better recommended as authority, if the facts, which it is said were all submitted to the jury, had been reported, and the opinion of the court of appeals had developed the reasoning by which the decision of the inferior court was sustained. That opinion simply affirms, that the court were satisfied with the instructions given to the jury, and with their finding.

Without extending my review of cases any further, I am of the opinion that the verdict of the jury does not embody such facts as will authorize this court to pronounce judgment. The case must be remanded, with instructions to issue a venire de novo.

Although the validity of the acts of 1807 and 1815, and of the several ordinances of the city of Detroit, are not necessarily involved in the decision of this cause, it may not be improper, inasmuch as their validity was drawn in question and fully discussed, to say, that neither the governor and judges nor the common council of the city of Detroit had, or have, any power or authority to grant the exclusive use of any of the streets or alleys to individuals. Such a use is inconsistent with the rights acquired by the act of dedication. Rights thus acquired are vested rights, protected by the constitution of the United States; and it is not, therefore, competent for the legislative power of the state, much less of the common council of the city, to pass any act or ordinance which shall in any wise impair or defeat those rights. The powers of the city authorities are restricted to the *regulation* of the streets: this is a necessary power, and one which, if wisely exerted, cannot fail to prove highly beneficial to the community; but the power to *regulate* streets does not include the power to pass ordinances which shall affect injuriously public or private rights. The common council are, to some extent, the guardian of those rights: as such, it becomes them duly to employ all the powers with which they are vested, to purify the streets of the city, and to cause all obstructions not warranted by law or necessity to be removed. The adoption of such a policy will remedy the mischiefs that have grown up under a course of legislation by which the rights of the public have been made subservient to the convenience or cupidity of individuals.

Certified accordingly.

SCOTT v. SMART'S EXECUTORS.

On the change from a territorial to a state government, the legislature of the state abolished the supreme court of the territory, and transferred certain causes pending therein to the supreme court and court of chancery of the state; but certain other causes pending therein, owing to a defect in the law, were not transferred to any court. The following year, the legislature passed an act transferring these last mentioned causes to the supreme court of the state. *Held*, That it was competent for the legislature to pass the act last mentioned, and that by virtue thereof, the causes were transferred to the supreme court of the state, to be proceeded in and disposed of.

To hold a law unconstitutional, it must be a plain violation of some provision contained in the constitution. It must be an ex post facto law, or a law impairing the obligation of contracts, or a law manifestly in collision with some constitutional provision.

PETITION to revive a suit in chancery. The facts fully appear in the opinion of the court.

Backus, for complainant.

Fraser and Davidson, for defendants.

By the court, WING, J. The petition in this case is filed, praying that a suit pending in this court may be revived.

The petition was filed January 2, 1849. It states that the petitioner heretofore exhibited his bill in the supreme court of the territory of Michigan, against defendants, which by an act of the legislature has been transferred into this court.

To this petition, some of the defendants therein named filed their plea, on the 4th of January, 1849, in which they state that said suit was originally commenced in the supreme court of the late territory of Michigan on the 31st day of August, 1826, in which court it continued and was pending and undetermined at the time of the adoption of the constitution of the state of Michigan: that by virtue of an act of the legislature of the state, entitled "An act to establish a court of chancery, and for other purposes," adopted the 26th of March, 1836, and which took effect on the 4th of July, 1836, it was enacted and declared, that all the powers and jurisdiction conferred on the supreme court of the late territory of Michigan, in and by an act entitled "An act to prescribe the mode of proceeding in chancery," are hereby conferred on said court of chancery: that by virtue of the provisions of this act, and a certain other act of said legislature, entitled "An act to organize the supreme court of the state of Michigan, and to establish circuit courts," approved the 26th March, 1836, which also took effect on the 4th of July, 1836, all jurisdiction, powers, and authority vested in said supreme court of the late territory of Michigan, touching all suits in chancery or otherwise, were repealed, abrogated, and taken away, and said court was then and there abolished, and ceased to exist, on said 4th of July, 1836; and that by force and effect of the provisions of the Revised Statutes of 1838, page 690 to 697, all and every law and provision of law by which said late supreme court had been either created or vested with equity powers or jurisdiction, were repealed: that on the 26th March, as well as on the 4th of July, 1836, the said suit in chancery was and remained undetermined in said supreme court of the territory of Michigan: that Elon Farnsworth had been solicitor, and so continued, and after the death of Miller he became one of the defendants, as executor of Miller, and on the 18th of July the said Farnsworth became and continued to be the chancellor, until the 28th day of February, 1842: that said suit so remaining in said supreme court of the late territory of Michigan has not been legally removed or transferred to this or any other court having cognizance to hear, try, and determine the same, by reason of which the said suit has become discontinued, abated, and ceased to be pending in any court whatever. The defendants, therefore, humbly pray the judgment of this court, whether the complainant is entitled to have said suit revived against them, and pray to be hence dismissed, with their reasonable costs, &c.

No objection seems to be made to the form or manner of raising the question arising upon the plea; the authorities appear to warrant such a plea to a petition for revivor.

The first section of the schedule accompanying the constitution, provides, that no inconvenience may arise from a change of the territorial government to a permanent state goverment, it is declared, that all writs, actions, prosecutions, contracts, claims and rights of individuals and bodies corporate, shall continue as if no change had taken place in this government, &c.; and all process which may, before the organization of the judicial department under this constitution, be issued under the authority of the territory of Michigan, shall be as valid as if issued in the name of the state.

Section 2. All laws now in force in the territory of Michigan, which are not repugnant to this constitution, shall remain in full force until they expire by their own limitation, or be altered or repealed by the legislature.

In this section of the schedule we have a plain expression of the intention of the framers of the constitution, that all causes pending in the courts of the territory of Michigan should be preserved. It was left to the legislature to provide courts for the reception and determination of such causes.

The word "actions" in the schedule, is, I think, used in its largest sense, and not in a limited or technical sense, and includes all civil actions pending in court at the time, whether they were cases at law or in equity. It is used in contradistinction to "prosecutions."

The constitution took effect and became operative from and after the first Monday of November, 1835. It may have been supposed that there was a doubt whether or not, by the mere change of sovereignty in the territory, all courts and legal proceedings would not terminate, and therefore the first section of the schedule was adopted. And it may have been expected that all causes then pending in the territorial courts would be transferred to the state courts, either before or at the time the territorial courts should be abolished.

By the act of the state legislature organizing the supreme court of the state, passed the twenty-sixth day of March, 1836, and which took effect on the fourth of July thereafter, all civil suits at law, and prosecutions pending in the supreme court of the territory of Michigan, were transferred to the supreme court of the state; and by an act establishing the state court of chancery, which was enacted and took effect the same day with the law last cited, all suits and matters in chancery remaining and pending in the supreme or circuit courts of the late territory of Michigan were transferred to the court of chancery established by that act, *except* those cases in which the chancellor was a party or of counsel; and it was enacted that this class of causes should be proceeded in by the courts in which the same originated, as though this act had not passed: provided, that in cases in which the chancellor might be interested or of counsel, the supreme court should have original jurisdiction.

It is, perhaps, enough to say, in relation to these acts, that the supreme court of the state held that they did not transfer the class of causes in which the chancellor had been counsel or a party, to the new supreme court. The opinion of the supreme court was not reduced to writing, and, therefore, we can only state the fact handed down to us by tradition.

The next question is, whether there is any limitation to the provision in the schedule preserving and continuing causes. It is said, the first section may be held to refer to the second section, as a means by which the causes were to be saved; and that if the laws were repealed which had been enacted by the territorial legislature, there could be no court in which causes could be left pending and to be continued: that there could be no suit without a court in which suitors could have a standing or their causes remain.

But it is urged, in opposition to this view, in substance, that the schedule preserved the causes until some new position should be assigned to them by a law of the state, whether sooner or later; and that the effect of abolishing the supreme court of the territory could not be to destroy that which was preserved and protected by a higher law, the constitution, to the provisions of which all the people of the state (including defendants) are presumed to have assented.

I must confess, these various considerations have occasioned me some embarrassment in working out a result which shall fully accord with the clearly expressed intention of the framers of the constitution: for if these causes are saved without the aid of legislation, or in spite of it, it must be accomplished by the mere power of the schedule. How it was done, I cannot clearly perceive—where the causes were preserved, I cannot clearly understand, any more than it could be seen or understood how or where Mohomet's coffin was suspended betwixt the heavens and the earth: and yet it is a matter of history, and as certain as a large portion of the facts stated by historians, that the coffin was so suspended. In the minds of the faithful, there was no difficulty in the case—no lack of power to accomplish such a result, and no lack of faith to believe in its accomplishment.

Without undertaking to express a very decided opinion as to the position of this cause after the law of this state took effect, abolishing the old territorial supreme court, let us proceed to trace the history of the legislation in reference to it.

The supreme court having decided that this cause was not transferred from the supreme court of the territory to that of the state, and the old supreme court having been abolished, the legislature, at their next session, on the 15th of February, 1837, passed another law, which was intended to remedy the defects in the prior legislation in relation to this class of cases. By this law it was provided, that all suits and matters in chancery in which the chancellor of the state had been a party or was concerned as counsel, theretofore commenced or pending in the supreme court of the territory of Michigan, and still undetermined, should be and the same were thereby transferred to the supreme court of the state for the first circuit; and all such chancery causes commenced or pending in said late supreme court, and still undetermined, in which the chancellor might not have been a party or concerned as counsel, should be and the same were transferred to the court of chancery for the first circuit; and it was further enacted, that said courts respectively should have cognizance thereof, and should proceed to hear, try and determine the same as if originally commenced in said court. Sess. L. 1837, p. 11.

By the Revised Statutes of 1838, p. 692, the act creating the old supreme court, and also the act creating the court of chancery above referred to, were repealed. P. 696.

On the 24th day of January, 1843, another law was passed, by which it was declared, that chancery causes depending in the supreme court of the state, *originally commenced there*, are transferred to the court of chancery; but causes in which the chancellor may be interested as counsel, may be decided by a judge. Sess. L. 1843, p. 8.

At a session of the supreme court held in January, 1839, the complainant again presented himself in the supreme court with the files in this cause, and the court ordered this cause docketed. He then filed a petition to revive the cause against the representatives of parties deceased. Defendants again met him there and opposed his motion—or, rather, they moved after the case was docketed that it be dismissed. The chancellor filed his certificate that he had been counsel in this cause.

We cannot learn what disposition the court made of the motion to dismiss, nor, indeed, that they acted upon it at all. After the act of 1843 was passed, it is said the supreme court intimated an opinion that this cause was, by operation of that law, tranferred to the court of chancery, and the chancellor thereafter entertained jurisdiction of it. But in 1848, the judge sitting in chancery in the first circuit dismissed the cause, and ordered it to be stricken from the docket, as never having been properly there, because it was not a cause which had, in the terms of the act of 1843, been originally commenced in the supreme court of the state. Thereupon the complainant, after attending the court of chancery a number of years, was remitted again to such rights as he had under the schedule, the laws, and the order of this court in the cause, by which it was docketed in 1839. So many years having elapsed since complainant filed his first petition in this court, he has, during the present term, filed a new petition to revive, to which defendants have plead as before stated.

The act of 1837, clearly embraces this cause. But it is said, it comes too late, as the cause had ceased to exist in any court, and by this act the suit or files were not transferred to this court. And the defendants claim that, inasmuch as the cause was discontinued, they have acquired a vested right, a right to remain out of court until brought in by the commencement of a new suit, in the ordinary way provided by the general laws of the land; and that the legislature cannot, by such a law, interfere or control their rights.

Before proceeding to the consideration of the operation of the act of 1837, we will remark, that if it was competent for the legislature to enact such a law, the repeal of the act of 1836, creating the supreme court under the constitution, by the repealing act of 1838, did not affect the act of 1837. Complainant's rights were saved by the fifth section of the general repealing act. R. S. 1838, p. 689. The act of 1837 was not repealed.

It is no doubt true, that at common law the process or proceeding in a cause should be regularly continued from term to term, or from one day to another in the same term, between the commencement and final judgment, and if there be any lapse of a term or want of continuance, the party is out of court, and the plaintiff must begin de novo. 1 Tidd's Pr. 678; 1 Strange 492; 1 Wilson 40; 7 Bac. Abr. 680; 2 Peters 523; 1 Hill 332; 6 Com. Dig. 266-7-8-9.

It was to meet the force of this rule that the provision of the schedule was adopted. If it had not the effect claimed for it, if by it the suit was not saved in spite of the common law rule, then is it in the supreme court by virtue of the statutes quoted? It is not objected that the transfer is made by statute, but it is insisted that no statute can have the effect to revive a suit, and give it life and a position on the calendar of this court, which died out of court for want of a court to entertain it. And if by operation of law the suit ceased, then a right accrued to the defendants to be discharged from it; and this became a vested right, and the legislature cannot entrench upon it.

The constitution of this state, article 1, sec. 17, provides that "no bill of attainder, ex post facto law, or law impairing the obligation of contracts, shall be passed." These are the only provisions of the constitution which have fallen under my eye, which I can suppose can have any reference to the question we are discussing.

The acts of the English parliament are in that country omnipotent, and they override private rights, if the intention of the parliament to do so is plainly expressed.

In these United States, it is said that in a private case between individuals, the court will struggle hard against a construction which, by a retroactive operation, will affect the rights of parties; and statutes are generally to be construed to operate in futuro, unless a retrospective effect be clearly intended. 2 Gall. R. 271; 9 Bac. Abr. Stat. C. p. 221 and note. Statutes are never to be applied retrospectively by mere construction. Jarvis *v.* Jarvis, 3 Edw. R. 462: 10 Mass. 437; Somerset *v.* Dighton, 12 *id.* 383; 16 *id.* 215; Thames Manufacturing Co.

v. Lathrop, 7 Conn. 550. The court say, when a statute is retrospective to a certain extent and for a certain purpose, it will not receive a retroactive operation to any greater extent, or for any other purpose.

It is a well settled doctrine, that the provision in our constitution, which is the same as that in the constitution of the United States in respect to ex post facto laws, does not refer to any but criminal cases or offences. 3 Story's Com. on Const. 266, sec. 1392. Judge Story remarks, in the same section, the other provision in the constitution relates to the impairing the obligation of contracts; and he then states, there are many laws of a retrospective character which may yet be constitutionally passed by the state legislatures, however unjust, oppressive or impolitic they may be. Retrospective laws are indeed generally unjust, and, as has been forcibly said, neither accord with sound legislation nor the fundamental principles of the social compact. Still they are, with the exceptions above stated, left open to the states according to their own constitution and government, and become obligatory if not prohibited by the latter. He cites Beach *v.* Woodhull, 1 Pet. C. C. R. 2; Calder *v.* Bull, 3 Dall. R. 386; Satterlee *v.* Matthewson, 2 Peters 380; Wilkinson *v.* Leland, *id.* 627, 661.

Many other cases are cited, and many other illustrations are given by this commentator, showing clearly that such a law as this does not impair the obligation of a contract. In some of the cases cited, in which it was held that the statutes under consideration did not impair the obligation of contracts, they operated upon the rights of parties much more injuriously than this law does upon the rights of the defendants. Some of the cases, it is true, would fall within the prohibition in our constitution, restraining the legislature from exercising judicial powers, as, for instance, the case of Calder *v.* Bull, in which the legislature of Connecticut granted a new trial, by law passed for that purpose.

In the case cited from 2 Gall. R. 271, a question arose whether a state could pass a law making a plaintiff liable for improvements made on lands by the defendant, who was in possession without right, and against whom judgment passed. The improvements were made before the act was passed. It was held, it did not impair the obligation of contracts, but as the law was retrospective, which was prohibited by the constitution of New Hampshire, the court held it to be void, and for this reason only.

In a case in 4 Wendell 206, an appeal was taken under an existing law, but the bond did not conform to the law; but before the appeal was dismissed, a law was passed authorizing an amendment of the bond. The law was held to be constitutional, though by the law before the new statute, the appellee was entitled to have the cause dismissed. This was a vested right, in the same sense in which defendants' right was vested.

In a note to the case in the 16 Mass. 215, the editor says, the act only gives a remedy where none existed before, and in this respect it did not differ from many acts giving jurisdiction in equity and providing remedies at law, which have never been thought to be objectionable by reason of their retroactive effect.

The cases cited from 3 Paige 344; 6 *id.* 323; 7 *id.* 354, are cases of vested rights not connected with the mere question of remedy. In the case in 2 Peters 380, cited above, the court held, that an act confirming a sale, before void, was valid if it did not affect the settled rights of property. In the case of Butler *v.* Palmer, 1 Hill 324, the question was made whether, after a sale of property subject to a redemption for a given period, the legislature could, by law subsequently passed, shorten the period of redemption. It was held they could do so, though, if no time of redemption was left, the law would be void. The court likened the power exercised by the legislature to the power exercised in passing statutes of limitations. Judge Cowen says: I know that rights of action and other executory rights are said to be vested. They are so, and a subsequent statute ought not to repeal them, though it may do so by express words, unless they amount to a contract within the meaning of the constitution. He further says, in the same case: The authorities are abundant in the United States courts, and in our own state, asserting that a statute impairing the remedy is constitutional. He cites 5 John. R. 139, 142. Strong expressions are to be found in the books against legislative interference with vested rights, but it is not conceivable, that after allowing the few restrictions to be found in the federal and state constitutions, any further bounds can be set to legislative power by written prescription. Judge Cowen mentions many cases of what he calls inchoate rights, and many cases showing that the legislature may pass acts affecting the remedy where it does not affect the contract, and where no legal proceed-sance in placing goods on the foot-way and carriage-way of one of the public streets of the city, and suffering them to remain for the purpose of being sold there, *so as to render the passage less convenient*, although not entirely to obstruct it."

It is a fair inference, then, that if the acts of the defendant had not the effect to "render the passage less convenient," he would not be guilty of a nuisance.

The case of the State *v.* Caldwell, 2 Speer's R. 163, would come better recommended as authority, if the facts, which it is said were all submitted to the jury, had been reported, and the opinion of the court of appeals had developed the reasoning by which the decision of the inferior court was sustained. That opinion simply affirms, that the court were satisfied with the instructions given to the jury, and with their finding.

Without extending my review of cases any further, I am of the opinion that the verdict of the jury does not embody such facts as will authorize this court to pronounce judgment. The case must be remanded, with instructions to issue a venire de novo.

Although the validity of the acts of 1807 and 1815, and of the several ordinances of the city of Detroit, are not necessarily involved in the decision of this cause, it may not be improper, inasmuch as their validity was drawn in question and fully discussed, to say, that neither the governor and judges nor the common council of the city of Detroit had, or have, any power or authority to grant the exclusive use of any of the streets or alleys to individuals. Such a use is inconsistent with the rights acquired by the act of dedication. Rights thus acquired are vested rights, protected by the constitution of the United States; and it is not, therefore, competent for the legislative power of the state, much less of the common council of the city, to pass any act or ordinance which shall in any wise impair or defeat those rights. The powers of the city authorities are restricted to the *regulation* of the streets: this is a necessary power, and one which, if wisely exerted, cannot fail to prove highly beneficial to the community; but the power to *regulate* streets does not include the power to pass ordinances which shall affect injuriously public or private rights. The common council are, to some extent, the guardian of those rights: as such, it becomes them duly to employ all the powers with which they are vested, to purify the streets of the city, and to cause all obstructions not warranted by law or necessity to be removed. The adoption of such a policy will remedy the mischiefs that have grown up under a course of legislation by which the rights of the public have been made subservient to the convenience or cupidity of individuals.

Certified accordingly.

Scott v. Smart's Executors.

On the change from a territorial to a state government, the legislature of the state abolished the supreme court of the territory, and transferred certain causes pending therein to the supreme court and court of chancery of the state; but certain other causes pending therein, owing to a defect in the law, were not transferred to any court. The following year, the legislature passed an act transferring these last mentioned causes to the supreme court of the state. *Held*, That it was competent for the legislature to pass the act last mentioned, and that by virtue thereof, the causes were transferred to the supreme court of the state, to be proceeded in and disposed of.

To hold a law unconstitutional, it must be a plain violation of some provision contained in the constitution. It must be an ex post facto law, or a law impairing the obligation of contracts, or a law manifestly in collision with some constitutional provision.

Petition to revive a suit in chancery. The facts fully appear in the opinion of the court.

Backus, for complainant.

Fraser and Davidson, for defendants.

By the court, Wing, J. The petition in this case is filed, praying that a suit pending in this court may be revived.

The petition was filed January 2, 1849. It states that the petitioner heretofore exhibited his bill in the supreme court of the territory of Michigan, against defendants, which by an act of the legislature has been transferred into this court.

old system of laws, in which a party was confined in jail upon a judgment upon contract, and the legislature had passed a law subsequent to the imprisonment discharging the party from imprisonment, it would not have been an unconstitutional exercise of power, for it would leave the obligation of the contract undisturbed. The states possess the rightful authority to abolish imprisonment for debt, and may apply it to present as well as future imprisonment. Mason *v.* Hale, 12 Wheaton 370; 6 Howard 630.

By these laws, all the rights which, in a constitutional sense, can be said to be vested in defendants, are preserved to them. They had no judgment: they had not, by the judgment of any court, established any right. The legislature have not presumed to decide upon their constitutional rights: they have only placed the respective parties where their rights may be tried, and where all the obligations growing out of their contracts may be ascertained and protected by the judgment of the court. They have only provided for a trial by this court, in the ordinary and constitutional mode.

It is certainly true, that this species of legislation for particular cases, to bring causes into court which may have been, by operation of a rule of law, discontinued, by granting extraordinary privileges to one party or the other, out of the ordinary course of justice, is susceptible of abuse, and may lead to great injustice, and ought to be warily employed by a wise legislature; but for us to hold a law unconstitutional, it must be a plain violation of some provision contained in the constitution. It must be an ex post facto law, or a law impairing the obligation of contracts, or manifestly in collision with some constitutional provision.

It would be difficult for us to say that a law is unconstitutional which grants a remedy in a class of causes simply affecting the mode in which the party is to be brought into court, leaving him all his other rights, and without which a complainant's rights may be lost, notwithstanding the care and solicitude of the framers of the constitution to preserve them. If the complainant cannot be permitted to proceed with his cause at this late day, without doubt he would be barred from commencing a new suit, which might not have been the case had this court decided against the admission of his suit in 1839.

It is said there are high authorities for saying there is in every government, somewhere, an absolute and despotic power. 3 Dall. R. 386. The exceptions to this are only such as are expressly specified in the written constitution. Subject to the provisions of the constitution, the power of the legislature to enact binding laws seems not to be limited. The exercise of powers such as are brought into operation by these laws, has been looked upon with jealousy by some, whilst others have considered them as necessary, under our form of government, to prevent a total failure of justice in certain cases not falling within the control of the judicial branch. At any rate, I can discover no clause in the constitution which prohibits them.

We are, therefore, of the opinion that it was competent for the legislature to pass the law in question: that it did not affect any vested right of the defendants, within the meaning of the constitutional prohibition.

But it is said, the files were not removed by the law. It is usual to provide more in detail for the transfer of causes, and to embrace the files; but we are inclined to think, this objection is not well taken. There can be no cause independent of the files and records, or minutes. The minutes of this cause on the calendar, in the supreme court of the territory, were entered on the calendar of this court in 1839, and the files were then brought into this court, and we think this is sufficient. The laws of the United States, referred to above, contained no provision for removing the files: they remained in the same court, and so did the files in this case.

It is the opinion of this court, that the plea of defendants, filed in this cause, in this court, be overruled.

Plea overruled.

IVES v. KIMBALL.

Under the act of April 12, 1827, Laws 1833, p. 281, the record of a deed executed and acknowledged in the state of New York, in conformity with its laws, with the acknowledgment certified by the officer taking it, in his official capacity, is evidence, without proof of the official character of the person taking the acknowledgment, or the genuineness of his signature.

A deed described a piece of land, as all that tract or parcel of land situate in the town of Logan, county of Lenawee, and territory of Michigan, being known and distinguished as the east half of the north west quarter of section *twenty one*, in township number *twenty six* south, of range number *three*. There was no surveyed township number *twenty six* in Logan. *Held*, that the number of the township might be rejected, as repugnant to the other parts of the description. And, it appearing from the act organizing the town, that there were two sections numbered *twenty one* in the town, corresponding with the description in the deed, one in surveyed township numbered six, and one in surveyed township numbered seven, both in range *three* east, the same was held not to be a patent ambiguity, although the court was bound judicially to take notice of the act organizing the town, and that parol evidence of surrounding circumstances and collateral facts might be received to show which of the two sections was intended by the grantor.

A record made in October, 1847, by a probate court, of a decree of the same court made in February, 1837, admitting a will to probate, is good evidence of the probate of the will.

A certificate of acknowledgment to a deed described it as the *foregoing mortgage*. *Held*, a clerical error, and that the certificate was sufficient.

To entitle a tax deed given in 1838, to be received as evidence of title, the regularity of the proceedings prior to the tax sale must be shown.*

Variance.

ERROR to Lenawee Circuit Court

Cooley and Bills, for plaintiff, in error.

Tiffany and Beaman, for defendant, in error.

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* The tax was levied and the land sold under the act of April 22, Laws of 1833, p. 96, sec. 15. The law has since been changed a number of times. Vide *note* to Scott v. Detroit Young Men's Society's Lessee, 1 Doug. Mich. R. 121, and R. S. 1846, p. 114, sec. 82.

By the court, GREEN, J. Several questions of considerable importance are presented by the record in this cause, and which will be examined in the order in which they are presented in the assignment of errors.

First: Did the judge who tried this cause in the court below, err in admitting in evidence the record of the deed from Daniel Hunt and Helen his wife, to Cornelius C. Bogart, without further evidence of its due execution and acknowledgment?

The deed purports to have been executed in February, 1834, and to have been acknowledged on the 10th day of that month, in Niagara county, New York, before Daniel Van Horn, one of the judges of the court of common pleas of said county. The statutes of the state of New York, in force at the time of the execution and acknowledgment of the deed, were introduced in evidence, by which it appeared that it was executed and acknowledged, and certified by the proper officer, in conformity with said statutes.

It was objected that the record was not admissible in evidence, unless it was also proved that the person before whom the acknowledgment purported to have been taken, was such officer as he represented himself in his certificate to be, and that his signature was genuine; and also that the register had no authority to record the deed, without evidence that it was executed and acknowledged according to the laws of the state of New York, and that such evidence should appear upon the record.

By sec. 7 of the act of April 12, 1827, Laws 1833, p. 281, which was in force at the date of the deed, it is provided, "That all deeds and conveyances of lands, tenements and hereditaments, situate, lying and being within this territory, which shall hereafter be made and executed in any other territory, state or country, whereby such lands, tenements or hereditaments shall be conveyed, in whole or in part, or otherwise affected or encumbered in law, shall be acknowledged, and proved and certified, according to and in conformity with the laws and usages of the territory, state or country in which such deeds or conveyances were acknowledged or proved, or in which they shall be acknowledged or proved: and all such deeds and conveyances are hereby declared effectual and valid in law, to all intents and purposes, as though the same acknowledgments had been taken, or proof of execution made, within this territory, and in pursuance of the laws thereof: and such deeds and conveyances, so acknowledged or proved as aforesaid, may be admitted to be, and shall be, recorded in the respective counties in which such lands, tenements or hereditaments do or may lie."

By the 6th section of the same act, the record of every deed, conveyance or other writing, which, by virtue of that act, should be entitled to be recorded, might, when so recorded, be read in evidence in any court of the said territory, without further proof.

The record, and not the original deed nor a transcript of the record, having been offered in evidence, the only material consideration involved in this question is, whether the deed was properly recorded. Had the deed been acknowledged within the territory of Michigan, the certificate of acknowledgment in due form, purporting to have been made by a proper officer, would unquestionably have been sufficient evidence of the official character of the person taking the acknowledgment, and of the genuineness of his signature, to entitle it to be recorded. Such has been the uniform construction of this statute, and its correctness has never been questioned to my knowledge.

Did the legislature intend to give the same effect to a certificate of acknowledgment of a deed in another state? I see nothing in the statute itself to indicate any other intention. It contains no provision authorizing the register to take proof of the official character of the person taking the acknowledgment, nor of the genuineness of his signature, nor of the conformity of the execution and acknowledgment to the laws of the state or country in which the deed was executed. Even if such authority could be implied, the register, not being authorized or required to make any record of such proofs, no record thereof would be evidence, if made by him; and it would be presumed, in the absence of any evidence to the contrary, that he had done his duty as a public officer, and taken the necessary proofs before recording the deed.

The case of Lessee of Livingston v. McDonald, 9 Ohio R. 168, seems to be in point upon this question. That was an action of ejectment, and the plaintiff, amongst other evidence, offered a certified copy of a deed from John Cleve Symmes to James Henry, proven by one of the subscribing witnesses before Reynold Keen, who certified that he was one of the associate judges of the court of common pleas of the city and county of Philadelphia. The deed was recorded in Hamilton county, while Butler, in which the land in question was situated, constituted a part of that county. It was objected to on the trial, on the ground that the official character of Keen was not sufficiently shown, and was rejected by the judge. The supreme court, on a motion for a new trial, held, that the deed was properly recorded, and that the certified copy of the record was competent evidence, and granted a new trial on the ground that it was improperly rejected. The law of Ohio, in force at the time when the deed from Symmes to Henry was executed, was substantially the same as that of 12th April, 1827, before referred to.

Second: Did the judge err in admitting parol evidence of the intention of Daniel Hunt to convey the premises in question to Cornelius C. Bogart, and to explain and give effect to said deed?

The description contained in the deed from Hunt and wife to Bogart, is as follows: "All that tract or parcel of land situate in the town of Logan, county of Lenawee and territory of Michigan, being known and distinguished as the east half of the north-west quarter of section twenty-one, containing eighty acres, and the north-west quarter of the north-west quarter of section number twenty-one, in township number twenty-six south, of range number three, containing in all one hundred and twenty acres of land, be the same more or less."

The township of Logan, as organized by an act approved April 12, 1827, (Laws of 1827, p. 359,) embraced "the south half of the surveyed townships numbered six, in ranges one, two, three, four, five, and townships numbered seven, in one, two and three," in the county of Lenawee, south of the base line, and east of the principal meridian: and such appears to have been the extent of the township of Logan at the date of the deed.

The plaintiff, upon the introduction of the record of the deed in evidence, offered to prove, by parol, that there was no such township as *twenty-six* in Logan; which proof was objected to, on the ground that the fact proposed to be proved appeared by the statute, of which the court would take judicial notice. The act organizing the township of Logan is a public statute, and, as such, the courts of this state are bound to take judicial notice of it; and it follows, inasmuch as the number of the surveyed townships embraced in Logan are specified in the act, that the court must judicially take notice that no township numbered *twenty-six* is included within its limits. This fact, then, need not have been proved: but as the proof of it could not tend either to settle or unsettle any thing affecting the case, the admission of it cannot be regarded as error. The court being cognizant of this fact, and it being conceded that there was no surveyed township numbered twenty-six in the county of Lenawee, nor within the territory of Michigan, it is at once apparent that this call in the deed is repugnant to every other portion of the description.

The other portions of the description call for the east half of the north-west quarter of section number twenty-one, range number three, in the township of Logan, county of Lenawee and territory of Michigan: all of which is perfectly consistent. The number of the township, then, it seems very clear, must have been mistaken in the deed, and being false, it must be rejected. But this does not, necessarily, render the deed void.

In the case of Boardman and others *v.* The Lessees of Reed and Ford *et al.*, 6 Peters 345, Mr. Justice McLean, delivering the opinion of the court, says: "The entire description in the patent must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent." In that case, the land was described in the patent as lying in the county of Monongalia, and further described by reference to natural monuments, and it apeared that the land described by the monuments was in the county of Harrison, and not in Monongalia; and that part of the description which related to the county was rejected, and effect given to the patent.

In the case of Stringer and others *v.* Lessee of Young *et al.*, 3 Peters 320, the same question arose upon a similar patent, and Chief Justice Marshall, delivering the opinion of the court, says, that the "misnomer of the county must admit of explanation: and if explanation can be received, the patent is not absolutely void."

The question, in the case of Loomis *v.* Jackson, 19 John. R. 449, arose between a party claiming under a mortgage, and a subsequent purchaser from the mortgagor. In the mortgage, the land was described as being a part of lot No. 51: in the deed, as being a part of lot No. 50. The description in the deed and mortgage were the same in every respect, except that the deed expressed the true number of the lot. Both instruments contained other calls from which the land could be identified, and the court rejected the false number in the mortgage, and held it valid.

Indeed, the doctrine, that "if there be certain particulars sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance false or mistaken, will not frustrate the grant," accords too plainly with "the suggestions of good sense and the dictates of morality," ever to be seriously questioned.

But in order to give effect to the deed in question, it is necessary to determine whether a sufficient description remains from which the land intended by the grantors to be conveyed, can be ascertained. By a reference to the statute under which the township of Logan was organized, it appears that the south half of township numbered six, and township numbered seven south, both in range three east, were embraced in Logan: and there are, consequently, two sections twenty-one, alike corresponding with the description in the deed—and there is nothing upon the face of the deed which shows which section was intended. It is therefore insisted that the description presents a *patent* ambiguity, which cannot be explained by parol evidence, and that the deed is, therefore, void for uncertainty. This ambiguity, it must be observed, does not arise from the equivocal character of the language employed by the grantors to express their *intention*, but from a fact which is not at all apparent upon the face of the instrument; and whether that fact be judicially known to the court, or be shown by parol evidence, I conceive to be entirely immaterial, and if so, then this is precisely the familiar case of a *latent* ambiguity, which may be explained by parol. It must be admitted at once, upon a bare statement of this case, that if parol evidence is legally admissible for that purpose, it might be very easily determined which of the two sections twenty-one was intended. There is no more useful, just and practical rule of law, than that which admits evidence of surrounding circumstances and collateral facts, within certain well defined limits, for the purpose of enabling courts to ascertain and carry into effect the intention of contracting parties. The cases in which this rule has been applied, are almost innumerable.

In the case of Fish *v.* Hubbard's administrators, 21 Wendell 651, the action was upon a covenant executed by the intestate, whereby he agreed to furnish the plaintiff "with *water out of the mill dam* sufficient to carry *the fulling mill and carding machine* at all times, except either in drought in summer, or the usual times of freezing in winter, and at all times to have such a share as is sufficient to carry *one wheel* when either of the wheels of *the grist mill and saw mill* are running."

Mr. Justice Cowen, delivering the opinion of the court, says: "The learned judge at the circuit thought the description of the property in the covenant so entirely uncertain, that the instrument was inoperative and void. And it is clearly so, if we are bound to stop with reading it, and cannot go beyond the face of the contract in search of its meaning." The court in that case, after a very elaborate review of the authorities, including Lord Bacon's rule as to ambiguities, decided that the extrinsic or collateral facts offered in evidence at the trial to show what *mill dam*, *saw mill* and *grist mill*, &c., were intended by the intestate, were improperly rejected, and awarded a new trial.

Mr. Greenleaf, in his valuable treatise on the law of evidence, section 300, remarks, that "the patent ambiguity of which Lord Bacon speaks, must be understood to be that which remains uncertain to the court, after all the evidence of surrounding circumstances and collateral facts, which is admissible under the rules already stated, is exhausted;" but that "if the court, placing itself in the situation in which the testator or contracting party stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot ascertain his meaning and intention from the language of the instrument, thus illustrated, it is a case of incurable and hopeless uncertainty, and the instrument, therefore, is so far inoperative and void."

After a careful examination of all the authorities cited by counsel, and many others upon this point, I have no doubt this was a proper case for the reception of parol evidence to show which of the two sections number twenty-one, in range three, in Logan, was intended to be conveyed by the description in the deed.

It appears from the bill of exceptions, that Hunt was allowed to testify directly, that it was his *intention* to convey to Cornelius Bogart the land in question. Had this been the only evidence given to the jury upon that point, or had there been any contradictory evidence, or any ground for doubt from the evidence of surrounding circumstances and collateral facts, independent of this direct testimony of *intention*, perhaps the judgment should be reversed for this cause. But is there any probability that the jury *might* have been influenced by it in making up their verdict? It appeared that Hunt owned the land in question at the time of the conveyance to Bogart, and that this was the land which he had agreed to sell to him. There was no evidence given or offered to show that Hunt owned any other land in Logan, corresponding with the description in the deed: and, in the absence of such evidence, it must be presumed that he did not. See Loomis *v.* Jackson, 19 John. R., before cited. These facts and circumstances impel the mind irresistibly to the conclusion, that Hunt intended to convey the land in question to Bogart, without any regard to the direct testimony of Hunt as to what he *actually* intended. The language of the deed itself implies that the grantor is the owner of what he grants, and, in connexion with the other evidence adduced, seems to me conclusive as to the intention.

Third: It is objected that the judge erred in admitting in evidence the record of the paper purporting to be the will of Cornelius C. Bogart. The will appears to have been regularly admitted to probate in February, 1837, but not recorded until October, 1847, upwards of ten years from the time of proving it: and it is insisted that, at the time the will was recorded, there was no law in force requiring such a will to be recorded, and that therefore the record was no evidence. Section 2, chapter 91, of the Revised Statutes of 1846, is as follows: "Every probate court shall be a court of record, and have a seal; and each judge of probate shall keep a true and fair record of each order, sentence and decree of the court, and of all wills proved therein, with the probate thereof," &c. The limited construction contended for by the counsel for the defendant in error, would, at each successive election and qualification of a judge of probate, leave many orders, decrees, wills, with the probate thereof, letters testamentary and of administration, &c., unrecorded, without any power in the new incumbent of the office to record them. This construction would do violence to the letter as well as the spirit of the statute, and is wholly inadmissible. The judge of probate is required to keep a true and fair record of each order of the *court*, and of all wills *proved therein*, with the probate thereof. When the record has been made by his predecessor, it is his duty to preserve it; but if he find in the probate *court*, a will proved *therein*, and not recorded, it clearly becomes his duty to make a true and fair record of it. The court of probate for Lenawee county has existed since the organization of the state government, and the admission of a will to probate ten years ago, is as much an act of the court as if it had been done at the time the will and probate were recorded.

Fourth: It is also assigned for error, that the judge erred in admitting the record of the deed from Isaac Bogart to Redfield and Kimball in evidence; and it is claimed that this deed was not properly upon record, for want of a proper acknowledgment. The certificate of acknowledgment appears to have been made at the foot of the deed as follows:

"State of Michigan, county of Lenawee, ss.—Personally appeared before me the above named Isaac Bogart, to me known to be the person described as the grantor in the *foregoing mortgage*, and acknowledged that he signed, sealed and delivered the same for the uses and purposes therein mentioned. Also personally appeared Cynthia Bogart, who on a private examination by me, separate and apart from her husband, acknowledged that she executed the said *mortgage* free, without fear or compulsion from any one. Given under my hand at Adrian, the seventh day of November, 1845. P. Morey,

Notary Public, Lenawee Co."

The question arises upon the misnomer of the instrument. It is described as "the foregoing *mortgage*," in the certificate, instead of "the foregoing *deed*." The mistake is evident. It seems to have been a mere clerical error, and the instrument, at the foot of which the certificate was made, appearing to be clearly indicated, the certificate must be deemed sufficient.

Fifth: The deed from Hewit to Isaac Merritt and John Merritt was properly excluded. It was a tax title deed given in 1838, and no evidence was offered to show that the proceedings prior to the sale for taxes were regular. 1 Doug. Mich. R. 119; 2 *id.* 204; and Harr. Ch. R. 1.

Sixth: The only remaining ground of error insisted upon in the argument submitted is, that the judge erred in deciding that there was no variance between the trust set out in the declaration, and that shown in proof. The trust set out in the declaration is, " to sell the said premises and apply the money which they should obtain from the sale of said land, to the payment of certain debts of said Bogart; and to pay the residue, after payment of said debts, to Cynthia Bogart, the wife of the said Isaac Bogart. In the declaration of the trust, proved on the trial, the grantees undertook, amongst other things, to pay to Elihu L. Clark the amount of two promissory notes purporting to be signed by Joseph Bailey; and it is claimed that it was not shown on the trial that the amount of these notes constituted a debt of Bogart. No other evidence appears to have been offered in reference to these notes, than what appears from the instrument declaring the trust. The fact that provision is made by Bogart for the payment of the notes, seems to me to imply that, though purporting to be signed by Bailey, they were either given to secure a debt of Bogart, or that he had in some way become obligated to pay them: and if this assumption be correct, then there is no apparent variance between the trust set out in the declaration in the cause, and that shown in proof. Even if the implication were otherwise, and the amount of these notes did not strictly appear to be an original debt of Bogart, yet his making provision for their payment renders it so far his debt as to satisfy the averment in the declaration.

Finding no error, therefore, in the record in this cause, the judgment of the circuit court therein must be affirmed, with costs to the defendant in error.

Judgment affirmed.

MONROE v. TOWNSHIP OF ROWLAND.

Plaintiff sued defendant on the following instrument: "The commissioners of highways of the township of Rowland will pay the bearer twenty-two dollars when funds in road district number three and four.

ALEXANDER PALMER,
Rowland, Feb'y 22d, 1841. HENRY CORNWELL,
Commissioners of highways in the township."

Held, it was not a warrant or order upon the township treasurer, under the act, Sess. L. 1841, p. 159, sec. 5, but a draft drawn by commissioners upon themselves, and that an action could not be sustained upon it against the township.

CASE reserved from Hillsdale Circuit Court. Demurrer to declaration.

Webb and Howell, for plaintiff.

Murphy and Kinman, for defendant.

By the court, MILES J. The declaration contains a special count upon an instrument in the following form:

"The commissioners of highways of the township of Rowland will pay the bearer twenty-two dollars when funds in road district number three and four.

Rowland, Feb. 22d, 1841.

(Signed) ALEXANDER PALMER,
HENRY CORNWELL,
Commissioners of highways in the township."

There are two other special counts upon similar instruments, and a common count for work and labor and upon an account stated.

A demurrer is put in to the special counts: to the common counts the defendant plead the general issue.

The other two instruments bear date on the 25th day of March, 1841.

There is an averment in each count that the instrument therein called a "road warrant" was delivered by the commissioners to the bearer thereof in payment of road work, and for the repair and construction of roads and bridges in the districts therein named.

It is further averred that the plaintiff is the holder and owner of the orders: that they were delivered to him before the commencement of this suit: that the township was in funds, by reason of the payment of road taxes, on the first day of April, 1847, and that on that day he demanded payment of the orders from the township, which was refused.

The conclusion of law drawn by the plaintiff from these facts, is, that the township is thereby rendered liable to pay the amount of the orders. The argument is, that the orders, as they are called, merely imply that the specified amount in each, of highway moneys in the township treasury was due to the holder for work and labor, and that the power to make them is necessarily incident to the office of commissioner of highways.

This proposition is, of course, denied by the defendant: and it remains to be determined, by a careful examination of the statutes relating to this proceeding, whether the plaintiff's declaration is in law sufficient.

By the statute existing at the time those instruments were made, it is provided, that the sum annually raised for the support of roads and bridges is to be paid to the township treasurer. R. S. 1838, p. 84, sec. 5. He is required to pay over and account for all moneys belonging to his township, according to the order of the township, "*or the officers thereby duly authorized in that behalf.*" R. S. 1838, p. 65, sec. 45. Both these statutes were re-enacted in the Revision of 1846.

We are not aware that, previous to the act of April, 1841, hereafter referred to, any provision was made by law for the particular mode in which the funds for this purpose were to be drawn from the hands of the township treasurer; though the commissioners would seem to be clearly entitled to control this fund, to enable them to discharge the duty of keeping the roads and bridges in repair, R. S. 1838, 4 sub. sec 1, p. 109, and to account to the township board for all moneys received. This fund includes not only moneys received by the commissioners, by way of fines and commutations, but also a sum annually raised for this express purpose, and assessed upon the township. R. S. 1838, pp. 109, 110, sec. 4.

By the act of 1841, p. 159, sec. 5, it is provided that no money shall be drawn from the town treasury by the commissioners of highways, in payment for any labor, contract or materials furnished, except by warrant signed by a majority of them, accompanied by their certificate, stating that the labor has actually been done, contract fulfilled and materials furnished, for which the amount of said warrant is to apply in payment. This statute was in force at the time this suit was brought.

One objection taken by the defendant to the sufficiency of the special counts is, that they contain no averment that such certificate was presented to the township treasurer at the time demand of payment was made.

In my judgment this is immaterial, as these instruments are not in the shape of warrants, or orders upon the township treasurer, but rather of a draft drawn by the commissioners upon themselves: and if we are correct in supposing that under the law as it stood before the act of 1841, the commissioners were entitled to receive and control the funds properly belonging to their department, then this form of obligation might seem proper, as evidence of indebtedness to the holders, to be liquidated when the commissioners were in funds.

Waiving, for the present, the consideration of the inquiry, whether the commissioners could in this way bind the township, the question may well be asked, whether the money should not go through the proper channel to the commissioners, to enable them to discharge their debt and take up their obligation.

But it is argued, that their annual report would include an account of this expenditure, and to whom; and therefore the funds, when received into the hands of the treasurer, would belong to the holders of the obligations, and they be entitled to receive the amount on their presentation. The proposition seems to be, that the commissioners have the right to contract these debts and compel the township to pay them, not in the regular course through their hands, or upon warrant and certificate, under the act of 1841, but upon presenting to the township the obligation of the commissioners promising to pay. This would completely avoid the act of 1841; and if the counsel for the plaintiff will tell me how these papers are to be made sufficient vouchers for the treasurer, upon a settlement by him, with the township board, I will consent to his right to recover in this case.

But we do not see how the plaintiff can recover without the aid of the statute of 1841, unless we consent to give such a construction to the statutes as to allow the commissioners of highways to contract debts with different individuals, and upon rendering an account of such debts to the township, to enable the holders of their paper to enforce its payment by the town.

This seems so entirely contrary to the whole scope, intention, and spirit of the act, that we must refuse our assent to such construction of it.

It is insisted, however, that the declaration is sufficient, under the act of 1841, without an averment of presenting the certificate; that this is a matter of evidence upon the trial. In this we think the plaintiff mistaken. If a demand is at all necessary, it must be such as is required by the act, and be specially averred. The statute is express in its terms of prohibition, *non constat*, that the treasurer would not have paid the money if the proper evidence of indebtedness had been presented.

We conclude, then, the demurrer must be sustained, and that it be so certified to the circuit.

Certified accordingly.

Fox et al. v. Willis et al.

A deed fraudulent as to creditors is not void but voidable, and can be avoided only by a judgment creditor, or one claiming under him, who has taken out execution and levied on the property fraudulently conveyed.

Where a debtor conveyed property in trust for creditors, which conveyance was fraudulent as to the creditors, and afterwards gave a mortgage on a part of the same property to a creditor who was aware of the previous conveyance, for the payment of a judgment the creditor had against him: *Held*, that the mortgagee, though a judgment creditor, inasmuch as he had not taken out execution on his judgment and levied on the land fraudulently conveyed, could not call in question the validity of the prior conveyance; and that he was not protected against it as purchaser for a valuable consideration, by ch. 1, tit. 6, part 2, R. S. of 1838.

APPEAL from the Court of Chancery. Case reported in Walk. Ch. R. 535. The facts of the case are fully stated in the opinion of the court.

Barstow and Lockwood, for complainants.

Fraser and Davidson, for defendants.

By the court, WHIPPLE, C. J. This cause comes before this court by appeal from the court of chancery.

The facts in the case, are briefly as follows: Clarke, being indebted, and probably insolvent, executed to one Dallee a general assignment of all his property for the benefit of his creditors; the assignment bears date 9th June, 1838. On the 20th June, 1838, Fox and Coleman, having a claim against Clarke and one McCreary, obtained judgment against them in the circuit court of the United States. On the 11th July, 1838, the defendants, Willis', also obtained a judgment in the same court against Clarke and McCreary, founded upon a pre-existing demand. Upon the 27th Feb., 1839, the Willis' issued their execution on their judgment. On the 7th August, 1839, Dallee, the assignee, died intestate. On the 20th August, 1839, Clarke executed to Fox and Coleman a mortgage, to secure the payment of their judgment. On the 1st of October, 1840, the Willis' filed their bill in the circuit court of the United States to set aside the assignment made by Clarke to Dallee. On the 1st March, 1842, the court made a decree setting aside the assignment as fraudulent; and the property in dispute in the present case having been placed in the hands of Drew, the receiver, he sold the same, by order of the court, to satisfy Willis' judgment. Fox and Clarke having filed a bill to foreclose their mortgage, the Willis', who became the purchasers at the sale by the receiver, come in and contest the validity of the mortgage.

The only question presented for our consideration, is, whether the prior mortgage of the complainants shall prevail against the subsequent conveyance by the receiver to the Willis'. The chancellor made a decree giving effect to the mortgage, to reverse which the Willis' prosecute this appeal.

It is to be observed, that the assignment by Clarke was executed previous to the Revision of 1838, which took effect on the 1st August, 1838; and that the conveyance to Fox and Coleman, by way of mortgage, was on the 20th August, 1839, a little more than one year after the revision took effect. The validity of the assignment, therefore, is to be tested by the Revision of 1833, and the mortgage by the Revision of 1838.

The Revision of 1833 embraces the provisions of 13th and 27th of Elizabeth, in respect to conveyances to defraud creditors and purchasers. By the 13th of Elizabeth, it is conceded by counsel, that the assignment executed by Clarke to Dallee was constructively fraudulent, inasmuch as it was burdened with conditions which contemplated a release by his creditors before they could avail themselves of its provisions.

The right of insolvent traders to execute voluntary assignments for the benefit of their creditors, is unquestioned, when they do not conflict with the policy of the bankrupt laws; they are regarded as substitutes for a commission in bankruptcy. Such trust conveyances, containing covenants on the part of the trustee, and stipulations beneficial to the creditors, are to be deemed and taken as founded upon a valuable consideration. The trustee, therefore, is, in legal contemplation, a purchaser for a valuable consideration, and becomes vested with the legal estate in the property assigned. 2 John. Ch. R. 189; 10 Pickering 413; 2 Kent's Com. 533. And it is always competent for the creditors, who are the parties beneficially interested in the conveyance, to compel the execution of the trust, though they be not at the time assenting, and parties to the assignment. 4 John. Ch. R. 529; 11 Wheaton 97; 4 Mason 206; 2 Kent's Com. 533. It is also said, that in respect to persons who are absent, their assent to such assignment will be presumed, until their dissent is expressed, if the conveyance be beneficial and founded on a valuable consideration. 2 Kent's Com. 533. If the assignment is made to *trustees*, and with their knowledge and privity, the assent of the *creditors* is not necessary to its validity. It appears affirmatively, on the face of the assignment by Clarke, that Dallee assented to it, and undertook the execution of the trust which devolved upon him.

Having laid down some of the general rules applicable to voluntary assignments by insolvent debtors, I shall now proceed to consider the questions raised by counsel on the argument, and involved in the case before us. That they are not free from difficulty, is readily admitted.

If considered, with reference simply to the provisions of the statutes by which the rights of the parties are to be determined, the burden would be comparatively easy; but when considered in the light of judicial decisions, those difficulties increase to an extent which renders it almost impossible to arrive at conclusions satisfactory to one's self. In the wide range of subjects which have claimed the attention of courts of justice, I know of none in respect to which there has been a greater diversity of judicial opinion than that upon which the judgment of this court is now to be pronounced. The sages of the law, both in England and this country, have entertained opinions diametrically opposite upon the true construction of statutes, alike distinguished for the clearness and simplicity of the language in which they are couched, as in the object the legislature had in view in their enactment. The industry of counsel has collected many of the adjudged cases to be found in the books upon the vexed questions which were so ably discussed. Those cases have been carefully examined, with many others which fell under my observation in the course of the somewhat minute and extended examination I have felt it my duty to give to the case before us. A review of those cases would involve an amount of labor I am not disposed to encounter, and would extend this opinion to an unreasonable length; the most I shall attempt, is, to state the conclusions to which I have arrived, and refer to such of the adjudged cases as support them.

It is proper to bear in mind, that the universally received doctrine now is, that the statutes of the 13th and 27th Eliz. are a legislative recognition of the common law: this fact will aid us in giving to these statutes a true construction.

The proposition sought to be maintained by the complainants is, that being *creditors* of Clarke, the assignment was, as to them, *void*; and being *void*, Clarke had a right to execute to them a mortgage for the security of their debt, upon lands previously assigned to Dallee.

It is admitted that, in respect to conveyances to defraud creditors, the statute declares them "utterly void;" and yet in the same section in which these words are found, such conveyances are to be deemed and taken as "utterly void" only as against the person or persons whose actions, suits, &c., "might be in any wise disturbed, hindered, delayed or defrauded."

Construing, therefore, the last clause of the section by what precedes it, we are enabled to arrive at the true interpretation of the words "utterly void." It does not mean to declare that such conveyances are *mere nullities*—void to all intents and purposes—but simply *voidable.* No act can be regarded as *absolutely void*, and of consequence a *mere nullity*, which takes effect as to some purposes. Chief justice Spencer, in the case of Anderson *v.* Roberts, 18 John. R. 515, gives a true interpretation of the words "utterly void," as used in the statute of 13th Eliz., when he says, that "whenever the act done takes effect as to some persons, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable."

At the common law, such conveyances are, as against the fraudulent grantor and his representatives, valid and effectual: if so, it cannot be contended that the statute, which is simply in affirmance of the common law, establishes a new rule. Mr. Justice Story, in the case of Bean *v.* Smith *et al.*, 2 Mason 252, says, "a conveyance to defraud purchasers, or to defraud creditors, is not *utterly void*, as has been sometimes supposed: it conveys the estate effectually as between the parties and their representatives, and the estate may be maintained against all persons but those whom it was intended to defraud."

Many other authorities in corroboration of these views might be cited, but it is deemed unnecessary to notice them at this time, especially as they will be found sustained by cases I shall have occasion to refer to before concluding this opinion.

It may be proper to remark here, that although a voluntary assignment to defraud creditors is not "*utterly void*," it may be admitted that courts, in administering remedies, treat the instrument as *void* in respect to those who are "hindered, delayed or defrauded," in their "actions, suits," &c. Or in other words, for the purpose of satisfying the claims of creditors, will treat the property conveyed, as though it still remained in the hands of the fraudulent grantor.

We are now prepared to consider the question whether Clark, being indebted to the complainants, could grant, and the complainants take a mortgage upon any of the real estate described in the assignment to Dallee, as a security for their debt. This will lead us to a consideration of the course proper to be pursued by a *creditor* who is "delayed, hindered or defrauded," in his "actions, suits or debts," within the meaning of the statute of the 13th Elizabeth.

Roberts, in his Treatise, on the construction of the statutes of 13th and 27th Eliz. p. 422, says: "The statute 13th Eliz. does not enlarge the natural jurisdiction of any court, by furnishing any new remedies. It merely avoids the voluntary act, leaving the rest to the consequences and remedies of law: where the lands and chattels are voluntarily and fraudulently transferred, the statute 13th Eliz. avoids the transfer as against creditors, who have a right to regard the property as unaltered, and still subject to their executions; but the statute helps them no further than by allowing them to avail themselves of this construction by the judicial remedies which flow from their rights."

The form of the remedy, and the circumstances under which it is administered, in favor of a creditor defrauded, under the 13th Eliz., is thus stated by Hovenden, vol. 2, p. 75: "To induce a court of equity to set aside a settlement, as being fraudulent under the 13th Eliz., the complaint must be made by a creditor who has put himself into a situation entitling him to apply for the aid of the court, by having obtained a judgment for his debt, and showing that, by the settlement, he is defrauded of the fruits of his judgment: for a voluntary settlement is void under this statute only as against creditors, to the extent in which it may be necessary to deal with the estate settled for their satisfaction: to every other purpose it is good: satisfy the creditors, and the settlement stands."

The text is illustrated by the case of Colman *v.* Crocker, 1 Ves. 161. George Colman, junr., committee of his father, brought a bill to set aside a voluntary settlement made by the lunatic, in trust for the benefit of the defendant. An order was moved for in behalf of the defendant, to sell the plate, linen, china, &c., to let the house, and to bring the property into court. The solicitor general, in opposition to the motion, stated that the lunatic's property was insufficient to pay his debts, and that the settlement was obtained by fraud. The lord chancellor refused the order, on the ground that there must be a creditor to complain of the fraud, who had put himself into a situation to do so, by getting judgment for his debt, and stating that by the settlement he is defrauded.

In the case of Spader and others *v.* Davis and Hadden, 5 John. Ch. R. 281, it appears that Davis had executed to Hadden an assignment, in trust, to pay all his creditors on condition that they would release and discharge him within thirty days. Hadden sold the assigned property and converted the same into money; and the trust having, as he alleged, become void in consequence of the creditors not having come in, he paid the assignor of those moneys from time to time, leaving a balance in his hands, at the time his answer was filed, of about $600. The chancellor, upon these facts, remarked, "that the complainants, at the time of filing their bill, had acquired, *as execution creditors at law*, a priority of right, valid in equity, to the trust moneys belonging to Davis, in the hands of Hadden; and that all payments of the same by Hadden to Davis, subsequent to the filing of the bill, containing notice of that right, and of their claim in pursuance of it, were made in his own wrong."

This case shows that the assignment, although fraudulent, was yet valid as between the parties, and continued such, until impeached by an *execution creditor*. Indeed, so effectual was it as between the parties, that the trustee was held to account only for what remained in his hands of the trust moneys at the time of the filing of the bill.

In the case of Brinkerhoof *v.* Brown, 4 John. Ch. R. 672, a bill was filed by a creditor to set aside as fraudulent a judgment, and to discharge from it certain real and personal estate which had been sold. The complainants' bill was dismissed, on the ground that, at the time of the filing of the same, they had not acquired a lien at law upon the real estate, as judgment creditors: nor had they, at the time of the entering of the decree, acquired, as execution creditors, a legal preference to the personal property by means of an execution duly issued and levied, or returned, nor shown that they could not obtain satisfaction of their debt by having tried in vain the ordinary process of such execution at law.

These cases, while they establish the jurisdiction of a court of equity to grant relief to a creditor who is aggrieved by the transfer by his debtor, of his property, whether that transfer was by grant or by means of a judgment fraudulently confessed, also indicate very clearly that creditors are left by the statute of 13th Eliz. to pursue the property fraudulently conveyed by their debtors, in the ordinary course, under existing remedies.

In the case of Bayard *v.* Hoffman, 4 John. Ch. R. 451, the property in controversy between the parties was public stock of the United

States. Upon the argument it was contended, that as stock was not subject to an execution at law, it is not within the statute of 13th Eliz., and Roberts, page 423, was cited in support of this ground. It is there stated, "that to the remedy at law, under this statute (13th Eliz.) there is a natural boundary affixed, where the voluntary gift is of money, or other flux or consumeable chattel; for the creditor must wait till he has prosecuted his suit to execution, before he is ripe for litigation upon the statute in question."

Chancellor Kent, however, held, that though the property could not be followed in the hands of the fraudulent grantee by execution at law, yet as a debtor might, under shelter of such a doctrine, convert all his property into stock, in defiance of his creditors, it would be productive of great injustice, and refused to recognize it as sound, and decreed accordingly.

This case, then, presents an exception to the general rule, that a creditor is bound to follow the property of his debtor, in the hands of his fraudulent grantee. The exception proves the existence of the general rule.

The next case I refer to, is that of Wiggins and others *v.* Armstrong *et al.*, 2 John. Ch. R. 144. The complainants, in their bill, alleged that two of the defendants were embarrassed, and, to *defraud the plaintiffs*, gave judgments to a large amount: that the plaintiffs had commenced suits against the defendants, but had not obtained judgments. The plaintiffs prayed for an injunction against proceeding on the alleged fraudulent judgments by execution. The chancellor, in delivering his opinion, uses this language: "My first impression was in favor of the plaintiffs; but upon examination of the cases, I am satisfied that a creditor at large, and before *judgment and execution*, cannot be entitled to the interference which has been granted in this case. In Angell *v.* Draper, 1 Ver. 399, and Shirley *v.* Watts, 3 Atk. 200, it was held, that the creditor must have completed his title at law by judgment and execution before he can question the disposition of the debtor's property." The chancellor, after citing other cases, concludes as follows: "The reason of the rule seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the debtor's rights. *Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds.*"

The case of Austin *v.* Bell, 20 John. R. 442, illustrates and confirms the rule as laid down in the authorities already cited. Bell, as sheriff of the county of New York, levied upon certain goods to satisfy two executions issued on judgments obtained by one Lambert, against E. Secor and Co. These goods were claimed by Austin and Andrews, by virtue of an assignment executed to them by Secor and Co., for the benefit of creditors. The levy was made before the expiration of the time limited by the assignment for the creditors to come in and execute it. Chief justice Spencer, in delivering the opinion of the court, remarked, that "Lambert, by suing E. Secor and Co., and by issuing executions on his judgments, had definitively made his election, and taken his stand, not to come in under the assignment, nor to execute it; therefore, as regards him, he is in the situation of a creditor refusing to execute the assignment, and able to make the objection, as well before as after the first of November, 1819, that it is void."

This case affirms what I have always supposed the law to be; that assignments, though fraudulent under the 13th Eliz., were nevertheless to be considered valid until a judgment creditor appeared, seeking in the ordinary way to enforce his legal remedy against the deed. It is by such a proceeding that a creditor is to make his election whether he will come in under the deed or not: if it be not pursued, his assent will be intended. The right of the defendant to a recovery was placed by his counsel (Judge Oakley) on the precise ground, that Lambert was a creditor "pursuing his legal remedies."

To the same effect is the language of the learned judge in Anderson *v.* Roberts, 18 John. R. 515; when discussing one of the questions involved in that case, he says: "The fee is not in abeyance, and the inevitable conclusion is, that the legal title has vested in the fraudulent grantee, subject to be divested, if the creditors see fit to call in question the fraudulent conveyance, *and after the creditor has proceeded to sell, on execution, the lands thus fraudulently conveyed.*"

Vice chancellor Mc Coun, in the case of Henriquies *v.* Hone, 2 Edwards 120, says: "Now, as between Moffatt, and Hall and Swan, the assignment is still good: neither of them are at liberty to invalidate it; and as respects the defendant himself, he has taken no steps to set it aside, nor is he in a position to attack the same, on account of not having obtained a judgment against his debtor. And so far from putting himself in the position of a judgment creditor, he appears to have been content to remain a creditor at large, and to come in under the assignment for a dividend or dividends, upon the terms which the debtor thought proper to prescribe. The defendant admits his never having disputed the validity of the assignment. Although the assignment may be void as to creditors generally, legal measures are still necessary on their part to avoid it; and he who does not join or concur in proceedings for the purpose, and takes no steps to place himself in a situation to receive a benefit from the debtor's property, except such as the latter chooses voluntarily to allow, must be deemed as acquiescing."

But it is said that, although this case was affirmed, upon appeal, by the chancellor and court of errors, still the reasoning of the vice chancellor was repudiated, for the reason that the appellant tribunals put their decision on the ground that Hone assented to the assignment by executing the same: that he could not, therefore, complain that it was void.

I do not understand the reasoning of the vice chancellor upon that feature of the case I am now considering, as overthrown either by the chancellor or the court of errors.

Hone having assented to the assignment, was considered by the chancellor as decisive of the case. The same view was taken by the court of errors. "This (says the ch. justice) is the true ground upon which the decision should rest, and upon this ground it cannot be controverted."

Hone was a creditor of the assignor: the assignees had placed a part of the assigned property in his hands, as auctioneer, to be sold. In his answer, he states that he sold the property on the 2nd November, 1832, more than four months previous to the rendition of the judgments in favor of the creditors, who filed their bill to set aside the assignment. It was contended by Hone, that the assignment being fraudulent as against creditors, he had a *prior* lien upon the proceeds of the goods in his hands. In answer to this position, the chief justice remarked: "He (Hone) insists that he acquired a lien on the 2nd Nov. 1832. *As against judgment creditors, pursuing their legal remedies* by creditors' bills, he has acquired no lien whatever. It is true, as he insists, that the assignment was declared void, but it was so declared as against the creditors who had filed their bill, not as against the parties to it, or those creditors who had assented to it."

I do not comprehend the force of language if this does not sustain the views of the vice chancellor, so far as it prescribes the remedies to be pursued by a creditor who has been delayed or hindered in the collection of his demand by a fraudulent assignment. Suppose that Hone, with a full knowledge of the existence of the assignment, had received the goods to sell as auctioneer from the assignees; and having actually sold the same, should retain the proceeds in his hands, to satisfy his claim against the assignor. Could he, as against a creditor who had obtained judgment, issued execution and filed his bill to set aside the assignment and to obtain satisfaction of his judgment, hold the proceeds so obtained? I think the judgment creditor would be deemed to have acquired the *prior* lien; and that it would be an unanswerable objection to the claim set up by Hone, that, having a full knowledge of the assignment, he had not adopted such legal measures as the law has provided for enforcing his rights. He would be told that, before he can complain of the fraud, his claim must be adjudicated upon and ascertained by a court of justice, which the law presumes is armed with sufficient power to enforce its judgments: that "unless he has a certain claim upon the property of his debtor, he has no concern with his fraud."

A reference to two or three other cases will complete my examination of the question under consideration.

It was held, in Murray *v.* Riggs, 15 John. R. 572, that "where a creditor is pursuing his debtor with a judgment and execution, or in any other manner, to enforce the payment of his demand, an assignment of the debtor's property, containing a power of revocation, may be very well considered as made to *delay, hinder or defraud* creditors, according to the language of the statute of frauds. But I do not see how it could in any sense be said to *delay* or *hinder* a creditor, who was taking no measures to enforce payment of his demand, as is the case now before us. For anything that appears, all the creditors of Robert Murray and Co. were satisfied with the assignment, and the provision there made for the payment of their debts."

Chief justice Thompson distinguishes this case from that of Clark *v.* Hyslop, 14 John. R. 465. He says: "Clark then was a judgment creditor, and had issued an execution against his debtor, which was levied upon the property assigned to Hyslop. The levy was made at a time, too, when, by the very terms of the assignment, the property was not held under it; that is, after some of the creditors had refused to come in and accept of the terms proposed, and before any new trust was declared, pursuant to the provisions in the assignment." He considers the language of Lord Ellenborough, in Meux *qui tam v.* Howell 4 East. 14, as establishing the proposition that no creditor could be delayed or hindered, within the sense and meaning of the statute of frauds, except such as were taking some measures to recover their debt.

It would be useless to multiply authorities upon a point in respect to which there seems to be an entire uniformity of opinion among judges both in England and this country. Indeed, it would appear to be one of the very few questions arising upon the construction of the 13th Eliz. in respect to which judicial opinions are entirely harmonious.

Nothing now remains but to apply the principles of these decisions to the facts before us.

The assignment to Dallee was executed on the 9th June, 1838. The complainants obtained their judgment against Clarke and McCreary on the 20th June following. No steps to enforce that judgment were ever taken by them. It might be well inferred that the prosecution of their suit (which was pending at the time of the execution of the assignment) to judgment, was an assertion on their part of dissatisfaction with the terms of the assignment, and of their purpose to avail themselves of their legal remedies as creditors, to test its validity, and obtain satisfaction out of the trust property. But obtaining judgment was but one step in the proceedings by which they could hope to achieve their object. The judgment not being, of itself, a lien upon the property, another step became necessary to render that judgment available: they were bound to take out their execution, and if no property of either Clarke or McCreary could be found upon which to levy and satisfy the execution, then the plaintiffs were at liberty, if the assignment was fraudulent as to them, to levy upon the property embraced in the assignment, or so much of it as was necessary to satisfy their execution. The levy being made, it would have been competent for the plaintiffs either to sell the property, or to ask the interference of a court of equity in aid of their execution at law. If a sale is made, it would then be competent for the purchaser, who would succeed to the rights of the creditor, to bring an ejectment, and thus test the validity of the assignment. If the other remedy be adopted, a court of equity, upon a state of facts warranting the conclusion that the assignment was fraudulent in respect to a creditor, who had pursued his legal remedies to every available extent, would remove the obstruction fraudulently interposed by his debtor, and decree satisfaction of the execution by a sale of the assigned property.

But the plaintiffs in the present case took no legal measures whatever to obtain satisfaction of their judgment: nor did they, or any other creditor, manifest any disposition to assail the assignment as fraudulent, until the Willis' filed their bill in 1840. How, then, can it be said of the plaintiffs that they are *hindered, delayed or defrauded* in the collection of their debt, when they do not avail themselves of the means which the law has placed in their hands to enforce its collection? The statute, 13th Eliz., declares assignments fraudulent as to those creditors, and those only, whose "actions, suits, &c." are "in any wise disturbed, hindered, delayed or defrauded."

Again: the right of a creditor to avoid a fraudulent conveyance, grows out of the fact that he cannot otherwise be paid out of his debtor's estate. Suppose that his debtor has other property beside that embraced in a fraudulent conveyance, sufficient to satisfy his debt. A court of equity, if that fact should appear, would not set aside the fraudulent conveyance until he should exhaust the property not embraced in such conveyance. And this, for the reason that he cannot complain that he is delayed or hindered in the collection of his debt, when property sufficient for its satisfaction is subject to an execution at law. If he can, by pursuing his legal remedies, obtain payment of his debt, it does not lie in his mouth to complain of the fraudulent conveyance. All that he can ask, is, that he be paid; and the law will not presume that he cannot, until, by the return of an execution, that fact is shown. In the case before us, the plaintiffs never sued out an execution: if they had, it may be that satisfaction might have been obtained out of the copartnership effects, which were primarily liable for the payment of the copartnership debts; if the joint property had been exhausted, then it would have been competent to make the judgment out of the individual property of Clarke or McCreary.

It is not enough for a creditor to say that he is defrauded, but he must furnish evidence of the fact. The evidence of this fact, required by statute 13th Eliz., is, first, that he has obtained a judgment; second, that he has issued an execution upon the judgment; and, third, a return, which shows that it has been ineffectual: nothing short of this will do.

There being, then, before us, no evidence by which we can intend that the plaintiffs could not have collected their judgment either from the individual property of Clarke or McCreary, they have not put themselves in a situation to complain of the alleged fraudulent assignment.

The Willis' having prosecuted their claim to judgment and execution, and having acquired title to the property through the decree of a court of competent jurisdiction, that title is to be deemed and held good as against the complainants, unless the mortgage under which they claim is valid under the provisions of ch. 1, tit. 6, part 2, of the Revision of 1838.

The first section of that chapter provides, that "every conveyance of an estate or interest in lands or the rents and profits of lands, and every charge upon lands, or upon the rents and profits thereof, made or created with the intent to defraud prior or subsequent purchasers for a valuable consideration, of the same lands, rents or profits, as against such purchasers, shall be void."

Section 2 provides, that "no such conveyance or charge shall be deemed fraudulent in favor of any subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefitted by such charge, was privy to the fraud intended."

Section 4 of chapter 3 of the same title, provides, that "the question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact and not of law."

These provisions are taken in *totidem verbis* from the Revised Statutes of New York.

The mortgage to the complainants was given on the 20th August, 1839, to secure the payment of their judgment; and, by its terms, the complainants were not only empowered to foreclose the equity of redemption under the statute, but were expressly authorized to issue execution on their judgment, and levy either on the mortgaged property or any other property of which Clarke might be possessed. Assuming that mortgagees, under this state of facts are purchasers, within the meaning of the statutes last above cited, we are now to determine whether they are such purchasers as are protected by those statutes. It has been held in England, that, under the statute 27th Eliz., a subsequent purchaser for a valuable consideration, even with notice, would hold as against a prior voluntary conveyance, or a conveyance founded on a good consideration, such as love and natural affection. Such voluntary conveyances, however, were considered as valid between the parties, and good against all but one who purchased for a consideration of value.

An examination of the English cases will show, that the earlier decisions attached to the phrases "intent to defraud" and "intent to deceive," a meaning more restricted than that given by the more modern decisions. That these words, as they are now expounded by the English courts, are made to embrace a class of cases never contemplated by the framers of the act, there can be no doubt. To sustain the doctrine that a prior voluntary conveyance, merely because it was voluntary, is void as against a subsequent purchaser for value, the ingenuity of judges was tasked to invent reasons which should sustain and justify it. Resort was had to legal artificial presumptions, false in fact, unsound in principle, and immoral in their tendencies. The word "voluntary" is not to be found in the statutes of 13th or 27th Eliz. It hence became necessary, in order to sustain the doctrine which assumed every such voluntary conveyance void, to assume, also, that it was made with "intent to defraud:" for there is no necessary connection, in reason or fact, between a voluntary conveyance and a fraudulent conveyance. This was easily effected, however, by one of those legal intendments which are not unfrequently resorted to by judges, when the real fact will not answer their purpose: thus, in Colville *v.* Parker, Cro. Jac. 158, it is said, "because it was a *voluntary* conveyance at first, and shall be intended *fraudulent* at the beginning."

Stripped of all disguise, the English doctrine is, that a voluntary conveyance, though made under circumstances which repel the imputation of any "intent to defraud," and from motives the most pure and elevated, becomes tainted from the beginning with fraud when the grantor executes a subsequent conveyance for value, notwithstanding the second grantee has full notice of such prior conveyance. The fact of actual notice to the grantee, according to the English doctrine, is matter of no moment, for the very *satisfactory and logical reason* that if he had notice, it was notice of a *previous fraudulent* conveyance. It is a little remarkable that a principle so unsound in theory, sustained by a presumption often contrary to the real fact, unwarranted by a common sense construction of the statute, and repugnant to our notions of justice and right, should have become so firmly rooted in English jurisprudence as to require the omnipotent power of parliament to eradicate it. It need not be said to the intelligent lawyer who has examined the subject, that the principle is now adhered to in England solely upon the ground of authority, and because to disturb it now would be to affect many titles built upon its rotten foundation.

In this country, judges of great ability have, on the ground solely of precedent, adopted the English rule: while others, of equal ability, have successfully resisted it as unworthy a place in American jurisprudence. In this country, the English doctrine may be considered as overthrown.

In this state, nothing is left to construction. Our legislature, in the second section of the chapter in relation to fraudulent conveyances, have declared their sense of what the law should be. No conveyance, such as is mentioned in the first section, is to be deemed fraudulent in favor of a subsequent purchaser, who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefitted thereby, shall be privy to the fraud intended. The distinction taken in the books between fraud in law and fraud in fact, is exploded. A subsequent purchaser is not protected, who has notice, actual or legal, of a prior conveyance, unless the grantee in such conveyance, or person to be benefitted by the charge, was a *particeps criminis* in the fraud. This view is sustained as well by the notes of the revisors, as by the subsequent decisions of the courts of New York.

But it is said that there is a distinction between *voluntary* conveyances and *fraudulent* conveyances: and this idea is justified by the language of both English and American judges. That there is a wide distinction in point of fact, I have endeavored to show, but that such a distinction is admissible when applied to the doctrines I have just considered, cannot be true. The whole current of decisions which declare a conveyance merely voluntary, void in respect to a subsequent grantee who has paid a valuable consideration, notwithstanding the grantee was affected with notice of the prior conveyance, was founded on the idea that such grantee was protected by the statute 27th Eliz.: and if so, it must have been because the voluntary conveyance was also fraudulent; for no conveyances, but such as are made with "intent to defraud" or "intent to deceive," are mentioned in the statute. Upon principle, then, but especially when considered with reference to our statute, how can the mortgage in the present case be sustained? Was it competent for the grantor (Clarke) to avoid his own deed to Dallee? This proposition cannot be sustained. According to Chief Justice Marshall, 1 Brock. R. 500, the grantee has title against all the world, except against creditors. He has a title defeasible by creditors only. It is good against the grantor and his heirs. If creditors do not object to the provisions of the assignment, surely he cannot: if they accept the terms which it prescribes, he cannot repudiate it. There is not the slightest evidence but what the creditors, at the time the mortgage was executed, were content to abide by the assignment, hard though it may have been in some of its provisions. In fact, no objection was made to it, and no attempt to defeat its execution, until the filing of their bill by the Willis'. If the instrument on its face was, in a legal sense, fraudulent, yet it bound Clarke: his creditors, and they alone, could impeach it: as to the rest of the world, it was good. But there is no reason for imputing a fraudulent *intent* either to Clarke the grantor, Dallee the grantee, or the creditors who were to be benefited by the charge. If so, how can the complainants claim under their mortgage? They had full notice of the prior conveyance, and had no right to assume that fraud in fact existed on the part of those who were the creditors of Clarke, the persons for whose benefit the trust was created. That was a question which the complainants, as creditors, had a right to try before a tribunal competent to pass upon it: that tribunal was a jury in a court of common law, or the chancellor in a court of equity.

The fact that the benefits designed by the assignment were coupled with conditions which creditors might deem inequitable and unjust, did not render it necessarily fraudulent in fact. Suppose, upon a trial of the question of fraud properly and legally made, it could be shown that the property assigned was sufficient to satisfy the claim of all the creditors; the presumption of fraud, which the law might deduce from matters apparent on the face of the assignment, would be effectually rebutted. A jury, under proper instructions, could not say that the assignment was fraudulent in fact, as it provided ample means to satisfy all the creditors, and would thus, in effect, cure that provision which contemplates a release by the creditors upon receiving a part only of their debts. Such a provision would become inoperative.

Upon the whole, I am of opinion that it was competent for the complainants, as creditors of Clarke, to impeach the assignment for matters apparent on its face: that the remedy provided by law and contemplated by the statute 13th Eliz. for the protection of creditors who are delayed or hindered in the collection of their debts, has not been pursued by the complainants: and that, not having pursued the remedy which the law provides, they cannot complain that they have been defrauded. I am further of opinion, that they cannot claim as purchasers for the reason that it does not appear that the assignment was fraudulent in fact, on the part either of Clarke or Dallee, and especially can it not be alleged that the persons to be benefitted by the charge were privy to any intended fraud.

It follows that the decree of the chancellor must be reversed.

Decree reversed.

NILES v. RANSFORD.

Where mortgaged premises were advertised by the mortgagee, in pursuance of the statute, to be sold under a power of sale in the mortgage, and the mortgagee afterwards, and before the day of sale, assigned the mortgage to a third person, who continued the advertisement in the mortgagee's name, instead of advertising anew as assignee in his own name, and on the sale purchased the mortgaged premises, the sale was held irregular and void, and not to bar the mortgagor's equity of redemption.

A conveyance of all one's right, title and interest in land, will pass the grantor's interest in a mortgage on the same land.

A lessee of a mortgagor is not estopped, in an action of ejectment brought against him by the mortgagor, from showing his interest in the demised premises as assignee of the mortgagee, to protect his possession.

Ejectment. Case made by the parties, and reserved by the Oakland Circuit Court. The facts, so far as it is necessary to state them with reference to the questions decided by the court, were as follows: Niles, on the 13th April, 1836, purchased the premises in question of George Postal, sen., and George Postal, jun., and at the time gave back a mortgage to Postal sen. for a part of the purchase money. The mortgage was not paid at maturity, and Postal sen. advertised the premises to be sold on 14th July, 1838, pursuant to the statute, under a power of sale in the mortgage. Afterwards, and before the day of sale, Postal sen. assigned the mortgage to Postal jun., who, without advertising anew, had the lands sold under the advertisement of Postal sen., by the sheriff, and purchased them on the sale. Niles afterwards redeemed, or attempted to redeem the mortgaged premises; but it is unnecessary to state this part of the case, as the questions raised by it are not noticed in the opinion of the court. On 23d April, 1838, Niles leased the premises to the defendant, Ransford, for one year; and on the 18th August following, Postal jun. and wife conveyed them to Ransford by warranty deed.

Joy, for plaintiff.

J. M. Howard and Stevens, for defendant.

By the court, Wing, J. The mortgage bears date the 13th April, 1836, and contains a power of sale. It was executed under the provisions of "An act entitled an act concerning mortgages," approved April 19, 1833, Laws 1833, p. 283. On sales under this act, for purchase money, no redemption is allowed. The act of 1837, Sess. L. 1837, p. 315, amendatory to the act of 1833, authorized a redemption within one year after sale on foreclosure of mortgages given for purchase money, and this provision was by the same act made applicable as well to mortgages executed before, as those executed after the passage of the act. After the amount secured to be paid by the mortgage fell due, George Postal, sen., the mortgagee, commenced a foreclosure of the mortgage by advertisement; which bears date the 18th April, 1838, and appoints the day of sale on the 14th July. Previous to the day of sale, and on the 8th June, the mortgagee assigned the mortgage to George Postal jun. In this assignment no interest is reserved to the mortgagee.

In case of the non payment of the sum of money secured by the mortgage, authority is given in the mortgage to the *mortgagee, his executors, administrators and assigns*, to grant, bargain, sell and convey the mortgaged premises at public auction, *according to the provisions of any statute now in force or hereafter to be passed.* By the 8th section of the law of 1833, it is provided that the sale shall be made *by the person appointed for the purpose in the mortgage deed*, or the sheriff, under sheriff, or any deputy sheriff of the proper county.

To determine whether the mortgagee or his assignee has complied with the power granted in the mortgage, we will first consider the nature and extent of this power. Mr. Sugden, in his Treatise on Powers, p. 223, remarks: "We must be careful to distinguish cases where the power is originally authorized to be executed by the donee of the power and his assigns, for in those cases where the power is annexed to an interest in the donee, it will pass with it to any person who comes to the estate under him, although there are twenty mesne assignments, or whether the claimant is an assignee in fact or in law, as an heir or executor."

This is the general doctrine. In New York they have a statute from which the act of 1833 was taken. Their courts have uniformly held that the ordinary power of sale in a mortgage is a power coupled with an interest; that it relates to the land, and is given to a person who derives under the instrument creating the power, a present interest in the land. Bergen *v.* Bennett, 1 Caines' Ca. 1-15; Wilson *v.* Troup, 2 Cowen 236. In this last case, Judge Sutherland calls it "a power appendant or annexed to the land." There are abundance of cases in the New York reports asserting the same doctrine; and these authorities also establish the doctrine, which would seem to flow of necessity from what we have said, that by an assignment of the mortgage, the power to sell passes with it. And it follows, that after assignment, the assignee must bring the suit to foreclose, and the mortgagee can no longer maintain a suit for that purpose, or even to recover seizin of the land, and if he attempts to bring suit, his alienation of the mortgaged premises may be plead in bar. Gould *v.* Newman, 6 Mass. 241; Wallace *v.* Dunning, Walker's Ch. R. 416.

In the case of Slee *v.* Manhattan Company, 1 Paige 78, Chancellor Walworth says, "The authority to execute the power is vested in the assignee by the mere act of assigning the legal interest in the mortgage. It always passes with the legal estate, unless there are some words of reservation." The authority to sell is a special power, and it must be strictly pursued. 3 John. Ch. R. 344. When the owner of a mortgage forecloses under the statute and this power of sale, the mortgagor is not made a party, as in case of foreclosure in chancery, and in this case it does not appear that he knew of the assignment before, if he did on the day of sale. The person so foreclosing must see to it that he in all material matters keeps within the powers given to him, for there are no legal presumptions or intendments raised by the law to support his proceedings, as there might be if the sale was made pursuant to a decree and order of a court of chancery.

It is urged by defendant's counsel, that it was competent to advertise the sale in the name of the mortgagee, though he had parted with his interest, because the power expressly authorizes the mortgagee, as well as his executors, administrators and assigns, to sell.

The power to sell was of necessity given to the mortgagee, but only because he had an interest; and I can see no better authority for his interfering, or for his name being used in this case, than there would be in an executor advertising a mortgage sale in the name of a deceased mortgagee. The notice might be seen, and the public and the mortgagor would be advised of the proceeding in the one case as well as in the other. I do not understand that it is a mere matter of form, as is suggested by Justice Sutherland, in the case of Wilson v. Troup. It is a question of power, and was designed to be confided and confined to the person who, at the time of foreclosure, owned the mortgage, otherwise the legal positions which we have established would have no force. (See justice Woodworth's opinion in the same case.) An advertisement in the name of the mortgagee in this case can have no greater force or effect than if it had been made in the name of a third person, a stranger to all the parties in interest, which would be none at all. If the advertisement may be made in the name of the mortgagee, it can only be on the ground of his having some power; and yet how can the power be divided or separated from the interest in the land? If it can be, what is to prevent a mortgagee, after he has assigned all his interest, from selling after the mortgage is forfeited or due, without any regard to the wishes of the assignee? Where is the restriction?

It is urged that the notice of sale is not required by the statute to be signed by any one, but no conception can be formed of a *legal notice* which does not disclose on its face that it emanates from some person or court claiming to have the power to act in the manner indicated by the notice. It is this that gives to it its force—that makes it a notice. The statute does not prescribe the form of the notice. It declares that a notice shall be given, in which certain matters shall be specified—it does not regulate its form in other respects.

The mere act of continuing the advertisement in the name of the mortgagee, by the assignee after he acquired the whole interest in the mortgage, gave it no force—he was no party to the notice. But let us suppose that the advertisement could be made in the name of the mortgagee: how then does the case stand? What evidence have we that the assignee, the grantor of defendant, purchased the equity of redemption at the mortgage sale? Defendant produces in evidence affidavits of publication, and affixing notice of sale and of the circumstances of such sale, and insists that the assignee being the owner of the mortgage, no further act or deed was necessary to perfect the foreclosure and vest the equity of redemption in him. Admitting that the 19th section of the act includes assignees as well as mortgagees, does he bring himself within the provisions of the section? This section authorizes the mortgagee to "purchase at any mortgage sale made in virtue of a power of sale contained in the mortgage," and it declares, that "his title shall not, on that account, be impeached or defeated at law or in equity: provided, the sale was in every other respect conducted in good faith;" and it further declares, "that the affidavits of publication and affixing notice of sale and the circumstances of such sale, shall be evidence of the sale and of the foreclosure of the equity of redemption, without any conveyance or certificate from the officer, in the same manner and with like effect as if such conveyance had been made." This section was doubtless intended to obviate the sound and established rule of equitable policy which disqualifies a trustee from becoming a purchaser of the trust estate without leave from chancery: and the reason of the rule is, to bar the more effectually every avenue to fraud. It was also designed to obviate the further difficulty presented by the fact that he could not deed to himself, and thus pass the title to the equity of redemption. But the owner of the mortgage did not sell.

The mortgagee advertised the sale, and the sale purports to have been made on the authority of his advertisement. If the assigneee had advertised, sold and purchased, then he might, perhaps, have purchased without a deed. In this case, and upon the assumption that the mortgagee might sell, a deed was necessary. None is shown, and none was ever executed.

This, then, is the position of the defendant before this court, in reference to the equity of redemption. The advertisement of sale was not made pursuant to the power given, and if it was, the grantor of the defendant obtained no deed, no title, and, consequently, we must regard the equity of redemption as being in the plaintiff.

From the case made, it appears that after the execution of the mortgage, and before the advertisement of sale, the defendant received from the plaintiff a lease of the mortgaged premises: that he entered into possession of the mortgaged premises under and by virtue of the lease, which was executed by both parties; and the plaintiff claims that the defendant is estopped from questioning his right to recover the possession of the land. The defendant bases his right to the possession of the land, first, as we have seen, upon the foreclosure and a conveyance from the purchaser at the mortgage sale. Secondly, if his title under the foreclosure is not valid, he insists that the deed from the assignee of the mortgagee, though insufficient to convey the equity of redemption, carries the interest in the mortgage, and he occupies the position of a mortgagee in possession before foreclosure. The case of Jackson v. Bowen, 7 Cowen 20, is an authority in point.

Postal jun., by his deed to the defendant, conveyed all his right, title and interest in and to the mortgaged premises—he had no remaining interest—his lien on the land by virtue of the mortgage, passed to the defendant, and he thereby acquired the right of an assignee. The intention was to pass a greater interest. If that failed, it is no objection to the operation of the instrument as an assignment. *Valeat quantum valere potest.* The mortgagor being considered only tenant at will to the mortgagee, the latter may assign the mortgage without making an entry. 8 Mass. 559. And when the mortgage is assigned, either by endorsement or a separate instrument, the assignee is put in the place of the mortgagee, to every purpose. The assignee might have maintained ejectment on the mortgage deed and the assignment to him, against the mortgagor or his lessee. Walker's R. 170. The defendant might have attorned to and taken a lease from George Postal, jun. 20 John. R. 51; 17 Eng. C. L. 368; 4 Kent's Com. 174; Powell on Mortgages 156.

But the law does not compel the tenant to resist the rights of the mortgagee—he may yield to them, and he has the right to show that the landlord's title has terminated. He could not dispute the right of his landlord to make the lease to him, but he is allowed, notwithstanding, to prove the nature of such title, and to show, though originally a valid one, it expired before the commencement of the action, and that the land then belonged to another: for such a defence is not inconsistent with the terms of the original possession. Jackson *v.* Davis, 5 Cowen 135; Adams on Eject. 276. He does not dispute the landlord's title—he confesses and avoids it by matter *ex post facto.* Hopcraft *v.* Keys, 9 Bing. 613; 2 Smith's Leading Cases 509, 510. He shows, that by consent of his landlord his title has passed to another, or rather, that as an incident to the mortgage, he, as assignee of the mortgagee, had the right to enter, and being in possession, though in the first place under a lease, he has the right to retain possession as purchaser of an interest it was competent for him to purchase, and the sale of which the landlord himself had authorized.

Certified accordingly.

CALENDER *v.* OLCOTT.

Under R. S. 1838, a deputy county clerk need not sign a writ in the name of the clerk. Where it was signed, "W. M., deputy clerk, and in the absence of the clerk," held sufficient.

The under sheriff may act in his own name, and need not sign a return to a writ served by him in the name of the sheriff. R. S. 1838. Were it otherwise, when the writ appears from the return to have been served by a proper officer the return is amendable, and a judgment will not be reversed by reason of the defect.

Error to Calhoun Circuit Court.

H. K. Clarke, for plaintiff in error.

Pratt, for defendant in error.

By the court, **Miles**, J. The errors assigned are,

First: That the summons by which the suit was commenced, was not signed by the clerk as required by the statute, R. S. 1838, p. 417 sec. 1; and,

Second: That the return of service upon the writ was not made by the sheriff.

The signature to the writ is in these words, "Walter Martin, deputy clerk, and in the absence of the clerk."

There was no appearance by the defendant in the circuit court: and it is now insisted, that the process and the return are both void, and, therefore, that that court proceeded without having acquired jurisdiction of the defendant.

The statute in force when this writ issued, declares, that the county clerk shall appoint a deputy, and in the absence of the clerk from the clerk's office, or from the court, the deputy may, in all things, and with the like effect, perform all the duties of such clerk. R. S. 1838, p. 45, sec. 39.

It is only upon the happening of a certain contingency, the absence of the clerk, that the deputy has power to act: and then, as the principal is by such absence incapable of acting, his place is supplied by his deputy, with full power to perform *all* the duties of the office. He is clerk for the time being, and his acts are not so much those of the clerk as his own acts, and hence the express provision of the statute that the clerk shall be answerable for the act of his deputy.

A distinction has been taken between doing an act by an agent and doing it by a deputy, whom the law deems such. An agent can only bind his principal when he does the act in the name of his principal; but it is said a deputy may do an act and sign his own name, and it binds his principal. The reason assigned for this distinction, is, that in law the deputy has the whole power of his principal. Story on Agency, p. 176, n. 1.

This principle would seem to apply well to this case, where the whole power of the clerk is for the time being vested in the deputy. That the contingency contemplated by the statute had happened, appears from the signature to the writ.

As to the return of the writ, Simonds v. Catlin, 2 Caines' R. 61, has been referred to by counsel for the plaintiff in error. In that case, the doctrine applicable to principal and agent before referred to is expressly laid down. The question there, was, whether a return made by an under sheriff in his own name, upon a writ of *fieri facias*, of a sale of the premises in question by the sheriff in his life time, and who died before the return was made, was an act of the sheriff of which the court would take notice. The statute declared, "that in case of the death of the sheriff of any county, the under sheriff of the same county shall, in all things, execute the office of sheriff of the same county *in the name of the deceased sheriff*," &c. Laws of New York, edit. of 1807, vol. 1, p. 206, sec. 5. The court very properly determined, that this was not, in pursuance of the statute, a return in the *name of the sheriff*.

At common law, the sheriff is only recognized: his under officers are not known as responsible to the party whose process is placed in the hands of the sheriff for execution.

The under sheriff must act in the name of the high sheriff, because the writs are directed to the high sheriff, and for this paricular reason. Parker v. Kett, 1 Salk. 96.

I fully recognize the objection made by the counsel for the plaintiff, that it is by means of the service and return of this writ, that the circuit court is to acquire jurisdiction of the defendant's person; but this is not like the case of the deputy clerk, who is only authorized to act in a certain particular instance, to wit, in the absence of the clerk—the under sheriff is expressly authorized by statute to execute all writs issued by lawful authority.

The language of the statute is, that "the sheriff and each of his deputies shall serve or execute, according to law, all writs, precepts and orders issued or made by lawful authority, and to him or them directed." R. S. 1838, p. 46, sec. 47.

This would seem to recognize the right of the under sheriff, who is by law made a general deputy, to act in his own name. But if his act is the act of the sheriff, and should so appear in his return, the power to perform the service being conceded, the only question is as to the form of the return.

If we are correct in this view, therefore, and if the return is defective for the reason stated, then the only remaining inquiry is, whether this defect renders the proceeding void, or whether it is amendable; the statute having declared, "that no judgment shall be reversed for any defect or imperfection in matter of form, which might by law have been amended. R. S. 1838, p. 462, sec. 22.

As a general rule, in all cases where the defect or mistake is owing to the default of any clerk or officer of the court, an amendment will be allowed. Gr. Pr. 664; 1 Petersd. Ab. 571, 572.

The summons was served by the proper officer: this appears from the return; and the omission is, to add the name of the sheriff in the signature to the return. This would have been permitted on motion in the court below. It is a mere formality, which can be supplied at any time. The substantial thing to confer jurisdiction upon the court over the person of the defendant, to wit, the service of the summons, in the manner indicated in the statute, has been done.

There appearing, then, to be no error, the judgment must be affirmed.

Judgment affirmed.

CASES
DETERMINED IN THE SUPREME COURT
OF THE
STATE OF MICHIGAN,
AT PONTIAC.

OCTOBER TERM, 1849.

PRESENT:

HON. CHARLES W. WHIPPLE, C. J.
HON. WARNER WING,
HON. GEORGE MILES,
HON. SANFORD M. GREEN,
HON. EDWARD MUNDY, } JUSTICES.

BRIGHAM ET AL. *v.* GURNEY.

Where the charge of the court to the jury, whether right or wrong, is in favor of the party excepting, it will not be reviewed, on error.

A promissory note payable to bearer, or endorsed in blank, may be sued in the name of an agent who holds it for collection.

ERROR to Oakland Circuit Court.

T. J. Drake, for plaintiff, in error.

Wisner, for defendant, in error.

By the court, WING, J. This is an action of assumpsit, brought by Gurney, before a justice of the peace, upon a promissory note, bearing date Feb. 17, 1844, made payable to William C. Brownell or bearer, for $65, with use, for value received, on or before the first day of January next. The suit was commenced on the 30th June, 1846. The declaration was in the common form, in which the plaintiff as bearer of the note alleges the note was transferred to him.

The defendants plead the general issue, and gave notice that the note was obtained by fraud and deception, and further, that the note is not the property of the plaintiff, and was never transferred or assigned to plaintiff. The justice rendered judgment for the defendants. From this judgment plaintiff appealed to the circuit court of Oakland county. In the circuit court the plaintiff recovered judgment. On the trial, exceptions were taken to the ruling of the court in admitting and rejecting evidence, and also to the charge of the court; and the cause comes before this court on writ of error and bill of exceptions.

At the trial, defendants offered evidence tending to prove that before the plaintiff became the owner of the note upon which the action is founded, he was fully informed of the facts and circumstances which constitute the defence, and of the fraud and misrepresentations of the person to whom the note was given. The defendants also proved that, at the time the note became due, it belonged to the plaintiff's brother in New York, by the admission of the plaintiff. The defendants also proved that the note was obtained under an express warranty of the soundness of a horse for which it was given.

The court charged the jury that, "if the plaintiff was a mere nominal owner, and that at the time the note became due it belonged to his brother, and his brother had notice of the defence, the defendants could avail themselves of it, and there being no proof that the brother of the plaintiff had sold the note, the jury might infer that he still owned it." To this charge the defendants excepted.

We do not see any necessity for reviewing this portion of the charge, since, whether right or wrong, it supported the ground taken by defendants.

The defendants then desired the court to charge the jury, "that if the plaintiff was not the owner of the note at the time of bringing the action, then the plaintiff could not recover; and the court refused so to charge, but did charge, that although the plaintiff's brother might own the note, get if it was sent to the plaintiff for collection, he might bring a suit in his own name; in such case, however, the same defence might be made as if the real owner had brought suit in his own name:" to which charge defendants excepted.

It is true, as a general proposition, that the bearer of a note payable to A. B., or bearer, may bring suit upon it, and the law presumes him to be the owner of the note, without further proof of ownership. But if it is clearly proved that plaintiff does not own the note, or if it is proved he found it or stole it, he cannot recover.

In this case, the charge sought from the judge was not applicable to the case before the jury; the proof was, that plaintiff's brother owned the note at the time it fell due, which was eighteen months previous to the commencement of the suit. This could scarcely tend to prove that plaintiff did not own the note at the time suit was commenced, for he might have purchased it afterwards. Indeed, we think the legal presumption was, that he had purchased it The proof that plaintiff's brother owned it when it fell due, would be but little more than to prove he owned it at the time it was made. If, in behalf of a bearer, the law will presume his ownership of a note in his possession, this presumption will arise as well and as strongly in reference to a note, with the possession of which the payee has parted after it is due, as after it is made; and, unless it be shown that plaintiff did not own it, and had no legal right to control it, to receive payment when suit was brought, the law will presume him (being the bearer) to be the owner. In this case, then, the proof did not present a case for the application of the doctrine which the defendants desired to have applied to it. In behalf of a bearer of a note payable to bearer, and in the case of a blank endorsement, suits have been sustained in the name of the bearer, though it was proven that he only held it for the purpose of collection, without any actual interest in it. 15 Wendell 640; 7 Cowen 174. As the case is presented, the plaintiff may be presumed to be either owner or agent to collect; and in either case the charge would not apply. It does not exclude the idea that plaintiff would fail if he was wrongfully in possession of the note.

The substantial rights of the defendants were in no wise prejudiced by the ruling of the court in this case, and they were permitted to make all kinds of defence without objection, precisely as if suit had been brought in the name of the payee of the note.

We think there was no error.

Judgment affirmed.

BARBER v. TAYLOR.

Where the plaintiff in a justice's court exhibits a promissory note endorsed by defendant, and states that he declares against defendant as endorser, without making any averment or statement as to the presentation of the note for payment, and notice of non-payment to defendant, the declaration is bad in substance and the judgment will be reversed.

ERROR to Oakland Circuit Court.

Stevens, for plaintiff in error.

M. L. Drake, for defendant in error.

By the court, MILES, J. This case originated in a justice's court, where the plaintiff below declared against the defendant below as endorser of a promissory note, and exhibited the note. The defendant did not appear, the plaintiff had judgment, and the defendant appealed.

The defendant's default for want of a plea having been entered in the circuit court, the plaintiff assessed his damages and had judgment.

The case seems to have been disposed of in the circuit upon the pleadings in the justice's court; for, although a plea of the general issue is set forth on the record in the circuit, still, it appears not to have been allowed, as the defendant made an ineffectual effort to set aside the default.

A question is now made upon the insufficiency of the declaration in matter of substance, and the only error assigned, is, that it was defective in this respect.

In determining this question, we may, perhaps, with propriety, at once resort to the rule so well established in New York and elsewhere, and which it is insisted should govern this court in reviewing the proceedings in a justice's court, which seems to be substantially this, that every reasonable intendment should be made in favor of the judgment below. Whenever the court can possibly intend from the record that the merits were fairly tried, they will not test by technical rules the *formality* of the pleadings. 3 Caines' R. 174. Technical nicety or legal precision is not required. *Id.* 153. So far as respects regularity and form, the rule is liberal. 1 *Id.* 594.

The rule might be stated thus: whenever the declaration contains a substantial statement of a cause of action, it shall be held sufficient. Substance is required, not form.

The undertaking of an endorser is conditional, dependent upon non-payment by the maker upon demand made at a proper day, and notice of such default to the endorser.

In an action upon a promissory note against the maker, the exhibition of the note in a justice's court, with a statement by the plaintiff that he declares upon the note, may well be held sufficient. The express promise to pay, and the breach, both appear. But the exhibition of a blank endorsement does not show this.

It was well said on the argument, that a man may be an endorser forever without incurring liability. The plaintiff declares against the defendant as endorser, is the language. The endorsement appears: but beyond that there is no averment, either in the verbal statement or in the writing. These averments are necessary to show a cause of action. In this view, then, I think the declaration clearly insufficient in matter of substance; and the defendant, never having appeared and plead, has waived nothing.

It appears from the record in the circuit court, that judgment was taken by default, and the plaintiff's damages assessed. Now, we might well inquire, what is admitted by this default? No more than is stated in the declaration, and if that does not contain a statement of a cause of action, such cause is not admitted by the default; and a mere assessment of the amount of plaintiff's damages does not entitle him to judgment.

It was said upon the argument, that the defendant neglected to plead in the circuit court: that neglect would entitle the plaintiff to recover for the cause of action stated in his declaration, and that the amount of that recovery was to be shown to the court. The plaintiff should, then, see that he has a good cause of action stated in his declaration, and if not, move to amend.

I think, then, upon every principle of law, this judgment ought not to be sustained. The defendant had it all his own way in both courts, and we cannot sustain the judgment without a greater relaxation of the rule applicable to the sufficiency of declarations, than has ever been permitted. *Judgment reversed.*

CASES
DETERMINED IN THE SUPREME COURT
OF THE
STATE OF MICHIGAN,
AT DETROIT.

JANUARY TERM, 1850.

PRESENT:

HON. CHARLES W. WHIPPLE, C. J.
HON. WARNER WING,
HON. GEORGE MILES,
HON. SANFORD M. GREEN,
HON. EDWARD MUNDY,
} Justices.

THE BOARD OF SUPERVISORS OF THE COUNTY OF ST. JOSEPH v. COFFENBURY *et al.*

Where, in an action of debt on a bond, the declaration alleged that the defendants acknowledged themselves to be held and firmly bound unto "the board of supervisors of the county of St. Joseph," and by the bond produced on the trial they were bound unto "the supervisors of the county of St. Joseph," the court held there was a variance between the bond declared on and the one produced, and that plaintiffs should have averred in their declaration that the bond was made to them by the name mentioned in the bond.

A bond in these words, "Know all men by these presents, that I, A. B., principal, and C. D., E. F., and G. H., sureties, *are* held," &c., "for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors and administrators, *severally*, firmly by these presents," is a joint as well as several bond.

A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, although there is no statute requiring such a bond to be given.

CASE reserved from St. Joseph Circuit Court.

Riley, for the plaintiffs.

Gurney, for the defendants.

By the court, MUNDY, J. This was an action upon a treasurer's bond, brought in the circuit court of St. Joseph county, in the name of the board of supervisors of the county of St. Joseph. In setting out the bond, the declaration alleged, that "the defendants acknowledged themselves to be held and firmly bound unto *the board of supervisors of the county of St. Joseph.*"

The bond is, in the obligatory part of it, in these words: "Know all men by these presents, that I, Jacob W. Coffenbury, principal, and Alonso R. Hunt, A. Woodworth, Calvin Bronson, &c., of the county of St. Joseph and State of Michigan, are held and firmly bound unto *the supervisors of the county of St. Joseph*, aforesaid, in the penal sum of ten thousand dollars, lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors and administrators, *severally*, firmly by these presents. Signed with our hands, and sealed with our seals, this 25th day of December A. D. 1844." The reading of the bond in evidence, was objected to: 1. For variance between the bond and declaration—the declaration being by the board of supervisors of the county of St. Joseph, while the obligation in the bond is *to the supervisors* of the county of St. Joseph. 2. That the bond is several and not joint. 3. That the board of supervisors had no power to receive, or sue a bond from the county treasurer, and that the bond is a nullity.

The plaintiffs submitted to a nonsuit, with leave to move to set it aside, and these questions are reserved for our consideration. There would seem to be a well founded objection on the ground of variance. The bond is alleged to have been given to the plaintiffs in their corporate name, whereas it was given to the supervisors of the county of St. Joseph. This, however, is amendable. The plaintiffs may declare in their corporate name, and aver that the bond was made to them in the name mentioned in it. 13 John. R. 38; 10 Mass. 367.

The bond, upon a true construction of its language, is I think joint as well as several. Coffenbury as principal, and the others as sureties, in the commencement of the bond, declare that they are held and firmly bound unto the supervisors of the county of St. Joseph. This is the acknowledgment of a joint obligation; in the *solvendum* part of the bond, they bind themselves *severally* to pay.

This is no more than saying, we are held and firmly bound in a certain sum, and we and each of us bind ourselves to pay. We should not put upon the bond a construction which would make necessary a multiplicity of suits, unless such was the evident intention of the parties. And we cannot suppose that they intended to make it necessary, in the legal enforcement of the bond, that each should be sued separately. "I promise to pay," in a note signed by a plurality of persons, whether as principals or as principal and sureties, is treated as a joint and several note. Story on Bills, 57. "We jointly *or* severally," is construed to mean, we jointly *and* severally. *Id.*

But it is said, that the supervisors had no power to require or receive a bond from the treasurer, and that it is a nullity.

Owing to inadvertence in legislation, there is no express direction that the bond should have been given to the supervisors of the county. By the Revised Statutes of 1838, p. 42, sec. 20, the treasurer is required to give a bond; and that section was in force when the bond was given. By the next section, he is directed to give the bond to the county commissioners of the county. By the act of 1842, Sess. L. 1842, p. 22, the office of county commissioner was abolished, and the supervisor system adopted; but the legislature, while they imposed upon the board of supervisors all the powers and duties of the board of county commissioners, omitted to make, in terms, an alteration in the law, so as to require the treasurer to give his official bond to the supervisors.

Inasmuch as the treasurer was required, before entering upon the duties of his office, to give bond, and as the supervisors were by law substituted in the place of the commissioners, clothed with all their powers and duties, I think we may well say, that the bond was properly given to them. But upon this point we are satisfied that, aside from any statutory provision, the bond was properly given, and is valid and binding upon the defendants.

It was a voluntary bond, given to the proper guardians of the interests of the county, to secure the faithful discharge of official duties by the financial officer of the county; and upon principles of public policy, as well as by adjudged cases, it is a valid obligation.

In 2 Lord Raymond, 1459, it was held that, though an executor is not obliged to give bail in error, yet the court may well take it; and if he will voluntarily enter into such a recognizance, it shall bind him.

In the case of the United States *v.* Tingey, 5 Peters 115, it was held, that a voluntary bond taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is entrusted, to secure the fidelity in official duties of a receiver or agent for disbursing of public moneys, is a binding contract between him and his sureties and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is an incident to the duties belonging to such a department; and the United States being authorized in a political capacity to take it, there is no objection to its validity in a moral or legal sense. In 7 Conn. R. 543, it was held that a bond given by a town collector, for the faithful performance of his duty, without any provision of law requiring it, was a valid bond. The court say: "The collector is not required to give a bond, nor are the selectmen authorized to take such bond. There is, indeed, no law directing that a bond shall be taken in such a case. It is not illegal in its nature, nor founded upon any illegal consideration. A collector is an authorized agent to collect moneys due the town. What forbids, then, the giving or taking a bond to secure the town?"

The same doctrine was held in Pennsylvania in regard to a prothonotary's bond. 6 Binney, 292.

It must be certified to the circuit court for the county of St. Joseph, as the opinion of this court, that the bond is valid; that it was properly given to the supervisors of the county of St. Joseph, and that an action may be brought thereon by the board of supervisors of such county.

Certified accordingly.

THE PEOPLE *ex. rel.* BROWER AND DELANY, *v.* THE JUDGE OF WAYNE CO. COURT.

An order made by a county court, dismissing an appeal, is a judgment that may be reviewed by the circuit court, within the meaning of the 67th section of the act to consolidate the laws in relation to county courts, and for other purposes. Sess. L. 1849, p. 288.

A mandamus will be allowed to set an inferior court in motion, but not for the purpose of requiring it to come to any particular conclusion, or of retracing its steps where it has already acted; and this irrespective of the question, whether the party has or has not another remedy.

MOTION for a mandamus.

Bishop, for the relators.

Goodwin, for the respondent.

By the court, MUNDY, J. From the answer of the judge of Wayne county court to the rule to show cause why a mandamus should not issue; it appears that the relators, Brower and Delany, had appealed to the county court from a judgment of a justice of the peace, rendered against them in favor of Elston, for the use of Dalrymple, and that the county court dismissed the appeal for the want of a recognizance.

Upon these facts, this court is asked for a mandamus to compel the judge of the county court to undo what he has done, to reinstate the cause in his court, to permit the relators to file an amended recognizance, and to proceed to the trial of the cause.

It is a well settled rule, already recognized in several cases in this court, that a mandamus does not lie when the party has another and an adequate remedy. By section 67 of the act of 1849, to consolidate the laws in relation to county courts, and for other purposes, it is provided that, "in all cases of judgment rendered by such court, in any civil suit, either party thinking himself aggrieved or injured by such judgment, or by any opinion or direction of the court, may remove the cause by bill of exceptions, certiorari or writ of error, into the circuit court for the same county in which such judgment was rendered." It is said that an order dismissing an appeal is not a judgment within the meaning of this section.

In Massachusetts, an appeal was given by the statute from any judgment of the common pleas to the supreme court. Under this law, it has been repeatedly decided by the supreme court of that state, that any *order* of the common pleas which determined the cause in that court, was a judgment within the meaning of the law, from which an appeal lay.

In Bemis *v.* Faxon, 2 Mass. 141, it was decided that a motion granted in arrest of judgment in the common pleas, came within the statute. In Tappen *v.* Bruen, 5 Mass. 194, the writ had been issued against Matthias Bruen and James Bruen, and the common pleas dismissed the action for want of service of the process upon James. The supreme court said, "that as an appeal only lay from the final decision of the common pleas, it has been doubted, as the appeal in terms is given to the party aggrieved at the *judgment*, whether an appeal lies from an *order* of that court, finally determining the action there. If this provision is to extend only to judgments technically considered, the party would be without remedy, if he had no day in court given him by an order to arrest the judgment, or to stay all proceedings in any action, which certainly could not be the intent of the legislature."

In Wood *v.* Ross, 11 Mass 271, the court, after referring to the previous adjudications, and affirming the doctrine that an appeal lay under their statute from any order calculated to terminate the suit, such as an order to stay all proceedings, say: "otherwise the court of common pleas, by refusing to enter a regular judgment, might oust this court of its appellate jurisdiction, given for the security of the citizen."

The order of dismissal by the county court, put an end to this cause in that court; and unless such order be considered a judgment which may be reviewed upon certiorari in the circuit court, such order would, it appears to me, be final and conclusive upon the parties, and, in the language of the Massachusetts cases, the party aggrieved would be without remedy. The party, then, whose appeal has been dismissed by the county court, being provided with a remedy by the statute, I might stop here with the answer this affords to the present application. But the right of the party to a peremptory mandamus having been placed upon the ground of the inadequacy of the remedy by certiorari, and the question having been fully argued, I think it well for this court to express its opinion upon what I consider to be the well established rule of this court in the exercise of its authority, by mandamus, over inferior judicial tribunals: and that is, that it will compel them to proceed, to act, but never direct them how to act, and this irrespective of the question whether the party has another remedy or not.

In the case of The United States *v.* Lawrence, 3 Dallas 42, it was determined by the supreme court of the United States, clearly and unanimously, after full argument, that, although they might command an inferior judge to *proceed to judgment*, yet they had no power to compel him *to decide* according to the dictates of any judgment but his own. In *Ex parte* Hoyt, 13 Peters 290, the supreme court say: "It has been repeatedly declared by this court, that it will not by mandamus direct a judge what judgment to enter in a suit, but only require him to proceed to judgment."

The same principle is laid down in Massachusetts, 10 Pickering 244; 20 *Id.* 495. The case of The People *ex rel.* Doughty, *v.* The Judges of Duchess C. P., 20 Wendell 658, is analagous to the one now before us. The common pleas had dismissed an appeal from the judgment of a justice, upon the ground of a want of jurisdiction, the affidavit and appeal bond reciting a judgment as rendered by the justice on the *eleventh* day of March, whereas the return of the justice showed a judgment rendered on the twelfth day of that month. The alternative writ required the judges of the common pleas to vacate the rule quashing the appeal, and to deny the motion to quash the appeal, or to show cause, &c. Bronson, J., delivering the opinion of the court said: "This presents an important question in relation to the appropriate office of the writ of mandamus. The court of common pleas, acting within the scope of its jurisdiction, has heard and decided a matter properly brought before it for adjudication, and the question is, whether we can by *mandamus* require that court to undo what it has done, on the ground that the decision was erroneous. I am of the opinion, that we possess no such power. I shall not stop to inquire whether the order quashing the appeal was such a final judgment upon the rights of the parties as may be reviewed by writ of error, or whether the relator has any other remedy. Commonwealth *v.* The Judges of the C. P. 3 Bin. 273. I place my opinion upon the broad ground, that the writ of mandamus cannot be awarded for the correction of judicial errors." After referring to various authorities, English and American, the judge says: "In general, a mandamus will not be awarded where the party has another legal remedy; but the converse of the proposition does not hold true. There are many cases where, although the party has no other remedy, a mandamus will not lie."

So in Elkins v. Athearn, 2 Denio 191, the supreme court of New York refused to entertain a motion for a mandamus, to compel the judges of the superior court of the city of New York to vacate a rule opening a judgment to enable a defendant to plead a bankrupt discharge, though it was urged that the order interfered with vested rights. The supreme court said: "The court acted judicially in making the order, and, whether right or wrong, it is settled that judicial errors cannot be corrected by mandamus. The writ will be awarded to set an inferior court in motion, but not for the purpose of requiring the court to come to any particular decision, nor to retrace its steps when it has already acted."

Whether we consider the case before us, then, in reference to the remedy by certiorari, provided by law, or in reference to the true office of the writ of mandamus, the motion of the relators must be denied.

Motion denied.

THE PEOPLE EX REL. ATTORNEY GENERAL v. VAN CLEVE.

A statement of the number of votes given at an election for the respective candidates, required to be made out and filed in the county clerk's office, by the board of county canvassers, is prima facie evidence only of the facts stated in it. The county canvass may be corrected by the township canvasses, and these by the ballots themselves.

The determination of the board of county canvassers of the persons elected, is prima facie evidence only of their election.

A party may go behind the canvass to the ballots, if not beyond them, to show the number of votes cast for him.*

The duties of the board of canvassers are wholly ministerial.

All it is necessary to state in a plea of title to an office, to an information in the nature of a quo warranto, is, the authority for holding the election, the holding of it, and that defendant received the greatest number of votes for the office.

The attorney general filed an information, in the nature of a quo warranto, against the defendant for exercising the office of judge of probate for Washtenaw county. The plea of the defendant, which is too long to be given at length, stated, among other things, that notice of a general election for said county, at which a judge of probate was to be elected, was given by the sheriff as required by law, and that such election was held on the day mentioned in the notice, and that at such election defendant was, by the greatest number of votes given in the several townships of the county, elected and chosen judge of probate for the county for the term of four years. It then stated a meeting of the board of county canvassers, and that they made out a statement of the whole number of votes given for judge of probate for the county, and that, on examining the original statements, or certified copies thereof, and ascertaining the number of votes given in the county at such election for county officers, and among them for judge of probate, they determined, conformably to the original statements certified by the several boards of inspectors of the townships in such county, or certified copies thereof, that the defendant was, by the greatest number of votes given in said county at such election for judge of probate, duly elected to said office: that they caused such determination to be subscribed, certified and attested by their chairman and secretary, and to be annexed to the statement of votes made out by them, and to be recorded with such statement, by the county clerk, &c., and that defendant had taken the oath of office. The plea did not aver that, by the statement of votes for judge of probate made out by them, it appeared defendant had the greatest number of votes, and that thereupon they determined he was elected. Neither did it aver that any sufficient statements of votes were made out in due form of law, by the inspectors of the township elections, nor that such statements ever reached the county clerk's office. The attorney general demurred, and the defendant joined in demurrer.

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* *Vide* The People *v.* Tisdale, 1 Doug. Mich. R. 59.

Lothrop, attorney general, for the people.

J. M. Howard and Barstow, for defendant.

By the court, Mundy, J. The main objection to the plea, is, that it is not averred that, by the statement made out by the county board of canvassers, it appeared that the defendant had the greatest number of votes, and that thereupon the board determined that he was elected. The objection involves an inquiry into the materiality of such averment, an inquiry to be solved by a just view of the effect which this tabular statement of the board has upon the title of the defendant to the office. There is no doubt, that he must in his plea show a good title: but if we shall come to the conclusion that that title is in no wise affected by any act or omission of the board (the defendant having their certificate of his election, and having taken the oath of office and entered upon its duties), the materiality of such averment cannot be sustained.

The very ingenious argument of the attorney general seemed to me to be based upon the supposition that the determination of the board was somewhat in the nature of a judgment at law, binding and conclusive, and that it afforded the only evidence of the rights of the contestants for this office; for, from the information, it does appear that Elias M. Skinner claims title thereto; and that such judgment must be based and appear to be based upon this statement as the finding of the board, as a judgment at law is rendered upon the verdict of the jury. But no such conclusive effect is given by the statute to this determination of the board, nor to the statement of the board, upon which it may properly be said to be founded.

The whole scope of the statute goes to show that this statement is but *prima facie* evidence: that in every contested election you may go behind it: that the county canvass may be corrected by the township canvasses; and that these may be corrected by the ballots themselves. A contested election is not to be decided by what does or does not appear in any of these statements.

This is evident from sec. 8 of ch. 6, R. S., p. 45, which directs that "the inspectors shall preserve a true copy of all ballots rejected as defective, with the originals attached, and deliver the same to the township clerk, to be filed in his office, and the other ballots they shall seal up and deliver to said clerk, who shall keep the same in his office, until the next general election, subject only to the inspection of the proper authorities in case of a contested election." The preceding section provides for the filing and preservation, in the respective township clerks' offices, of the statements of the township canvassers.

If, then, the statement of the county board is not conclusive upon the rights of the contestants, any averment in the plea, that it appeared from such statement that the defendant had the largest number of votes, would be an immaterial averment. The election of the defendant and his title to the office depend upon his having received the largest number of votes given for the office, and this title is properly set out in the plea.

All that is said about the proceedings of the county board is immaterial: it may be struck out as surplusage, and will not vitiate even on a special demurrer. 1 Chitty's Pl. 229. The precedents in Wentworth, and there is a large collection of them, go to show that all that is necessary for the defendant to state in showing title, is the authority to hold the election, the holding of it, and that the defendant received the largest or the requisite number of votes. All this is properly averred in the plea in this case, with the further averments of the determination of the county board of canvassers in his favor, their certificate of his election, and his qualification by taking the oath of office.

The other objections to the plea, that it does not aver that any sufficient statements were made out in the requisite form by the inspectors of the township elections; or, that they ever reached the county clerk's office, as well as the one before noticed, are based upon the supposition that the defendant's title may depend upon the regularity of the proceedings of the boards of canvassers; and that, to establish his title, he must set out and show a strict fulfilment of their duty by these several boards.

The answer to this is, it seems to me, to be found in those provisions of the statute before referred to, which show that you may go behind all these proceedings—that you may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding, or the person claiming the office. And this is as it should be. In a republican government, where the exercise of official power is but a derivative from the people, through the medium of the ballot box, it would be a monstrous doctrine that would subject the public will and the public voice, thus expressed, to be defeated by either the ignorance or the corruption of any board of canvassers.

The duties of these boards are simply ministerial: their whole duty consists in ascertaining who are elected, and in authenticating and preserving the evidence of such election. It surely cannot be maintained that their omissions or mistakes are to have a controlling influence upon the election itself. It is true that their certificate is the authority upon which the person who receives it enters upon the office, and it is to him *prima facie* evidence of his title thereto; but it is only *prima facie* evidence.

If an issue had been made, as it well might have been, by a replication denying that the defendant was, by the greatest number of votes given in the several townships of the county of Washtenaw, elected judge of probate, the very fact which the attorney general supposes he would have been able to show, if the plea had contained an averment that it appeared from the statement of the county board of canvassers that the defendant had the largest number of votes, upon which he could have taken issue, might have been shown by him, if such statement would show it. So that the view which I have taken of this plea, does not deny the people the advantage of any evidence properly within their reach.

The view which I have taken of the effect of the statement of the county board, is fully sustained by the opinion of the supreme court of the state of New York, in the cases of the People *v.* Ferguson, 8 Cowen 102; and the People *v.* Vail, 20 Wendell 14.

In the case of the People *v.* Ferguson, it was held, notwithstanding the determination of the canvassers in favor of the defendant, that the court and jury could look even beyond the ballot boxes, and inquire whether votes given for H. F. Yates were not intended by the voters for Henry F. Yates. In the case of the People *v.* Vail, Justice Bronson, delivering the opinion of the court, said: "The decision of the canvassers was conclusive in every form in which the question could arise, except that of a direct proceeding by *quo warranto*, to try the right. But to hold it conclusive in this proceeding, would be nothing less than saying, that the will of the electors, plainly expressed in the forms prescribed by law, may be utterly defeated by the negligence, mistake, or fraud of those who are appointed to register the results of an election."

The demurrer must be overruled, with leave for the attorney general to reply.

Demurrer overruled.

BUCHOZ *v.* GRANDJEAN AND GRANDJEAN.

A partner cannot submit partnership matters to arbitration without a special authority for that purpose from his copartners.

ERROR to Wayne Circuit Court. Henry and Gustave Grandjean, who were partners, sued Buchoz in the court below, in assumpsit on an award. On the trial of the cause, the plaintiffs below, after having introduced evidence of the submission to arbitration by Buchoz and Henry Grandjean, on behalf of himself and Gustave, who was not present when the submission was entered into, offered the award of the arbitrators in evidence, which was objected to by defendant's counsel, for the reason, that no authority was shown by Henry from Gustave to enter into the submission for him, Gustave. The objection was overruled, and the award received in evidence.

Bishop and Hawkins, for plaintiff in error.

Goodwin, for defendants in error.

By the court, MUNDY, J. The reason for the ruling of the court, as appears from the bill of exceptions, was, "that if the defendant chose to submit for the consideration of the arbitrators, matters existing and in dispute between him and the two Grandjeans, he could do so: and if he did so, and the account was made out in the name of the two Grandjeans and himself, and submitted without objection on his part, he could not now object that Henry Grandjean was not authorized to act in behalf of himself and brother, as partners." Such conduct on the part of Buchoz might amount to an admission that Henry and Gustave were partners. It showed that he had treated them as such, and then considered them, as such: but it would not amount to an admission that Henry was authorized by his copartner to submit for him. Buchoz might have supposed, and he undoubtedly acted upon the supposition, that the submission was mutually binding upon the parties interested in the matters submitted; and, so far as his rights and his liabilities were concerned, he was only interested to know, that the submission was such that under it a valid award might be made; that that which *he* sought, a final settlement of the matters in difference between himself and the Grandjeans, might be amicably effected.

His conduct, it appears to me, is free from all suspicion: the dishonesty, if any there was, was upon the other side; and it would be a strange perversion of justice to determine that an award made under such circumstances, while it could not be enforced against Gustave Grandjean, should be binding upon Buchoz.

In the case of Eastman *v.* Burleigh and Burleigh, 2 N. H. Rep. 484, the parties entered into a rule before a magistrate for a reference of the matters in controversey between them, but the agreement to refer was signed by "*Daniel Burleigh*, for himself and *William Burleigh*," and the rule recited that "*Daniel Burleigh*, for himself and brother, *William Burleigh*," on the one part, applied for it. It nowhere appearing in the proceedings that *Daniel* had any authority from *William* to enter into the rule, or that *William* had any thing to do with the proceedings, the supreme court reversed the judgment upon the ground, that the award being, as to *William*, a mere nullity, it was not final as between the parties to it, and was, therefore, void. Woodbury, J., in delivering the opinion of the court, said: "It is now too late for *William*, after the award is in his favor, to ratify the doings of his brother;" and this was based upon the ground that a suit would lie in his favor upon the claims submitted: and thus the award not only fail to be final as to him, but lose all the mutuality intended by the plaintiff and the referees. Kyd, in his Treatise on Awards, p. 148, speaking of the rule, that the award must be mutual, says, that the principal requisite to form that mutuality, is nothing more than that the thing awarded to be done, should be a final discharge of all future claim by the party in whose favor the award is made, against the other for the cause submitted.

That one partner cannot submit to arbitration partnership matters, without the special authority of his copartners, is laid down in 3 Bingham 101, and 1 Peters 222, and is, we think, the proper rule.

The judgment of the circuit court must be reversed.

Judgment reversed.

CARGILL v. POWER.

A mortgage containing a power of sale was given in January, 1847, and the mortgaged premises were advertised and sold under the power in July, 1848. Between the giving of the mortgage and the sale, the law regulating the time of redemption by the mortgagor was changed from two years to one year. It was held, that the law in existence at the time the mortgage was executed and delivered, was a part of the contract: that the mortgagor had two years from the sale to redeem in, and that the law in force at the time the sale took place, restricting the redemption to one year, was unconstitutional, so far as it respected mortgages in existence at the time the law took effect.

CASE reserved from Oakland Circuit Court.

Van Dyke and Emmons, for plaintiff.

Joy, for defendant.

By the court, MUNDY, J. This was in its inception an action to recover the possession of land under a summary proceeding in the county court of Oakland, authorized by section 3 of chapter 123 of the Revised Statutes, which, as one of the causes for such proceedings, is in this language: "When any person shall continue in possession of any premises sold by virtue of any mortgage or execution, after the expiration of the time limited by law for the redemption of such premises."

By the proceedings in the case, it appears that the plaintiff, the assignee of a mortgage executed in January, 1847, by the defendant to Myron Botsford and P. Dean Warner, purchased the premises at an auction sale, under the power contained in the mortgage, in July, 1848 and received a deed for the same from the sheriff of Oakland county, with an endorsement thereon that the deed would become operative in one year from that time.

The proceedings, it is stipulated, were regular, and the only question reserved, is, has the mortgagor, under the law, one or two years for redemption? It is insisted, that, as the mortgage was executed after the passage of the Revised Statutes, but before they took effect, that the intention of the parties was, that the proceedings under the power to sell should be regulated, and their rights governed, by the provisions of the Revised Statutes.

No statute has, *ex proprio vigore*, any force until it becomes the law of the land. All persons are bound to know, and are supposed to know, what the law is: and as it is that which is to govern the actions and conduct of men, their contracts, it is to be presumed, are made in reference to it, unless the contrary is expressly shown.

It does not appear that the parties knew what were the provisions of the Revised Statutes: what alterations they had made in that which was the subject matter of their contract. They knew that there was a law in force regulating the time and mode of sale under the usual power contained in a mortgage—regulating, also, the execution of the deed of conveyance, and its operation and effect. With what propriety, then, can we say, that the legal presumption is, that their contract, in its very terms made in reference to the law, was not made in reference to the law in force, but in reference to one which might never take effect? This cannot be the legal presumption; and when we consider that at the time when the contract was made, the legislature was in session, and that in these days of multitudinous legislation there is no great stability in the law itself, I think it cannot be said that such is a rational presumption.

The Revised Statutes having given to the purchaser a right of action against the mortgagor continuing in possession of the mortgaged premises after the expiration of the time limited *by law* for their redemption, and the same statutes having reduced the time of redemption given by the law of 1844 from two years to one, it is necessary to consider the constitutionality of these provisions of the revised statutes, as they bear upon the inhibition in the constitution of the United States against the enactment by a state legislature of any law impairing the obligation of contracts.

The counsel for the plaintiff insisted, in his argument, that the mortgage is but a remedy provided by the parties for the enforcement of their contract, and, like all other remedies, is subject to the reasonable control of the legislature. There is no doubt, that whatever belongs to the remedy may be altered according to the will of the state: provided, the alteration does not impair the obligation of the contract. This is the settled doctrine of the supreme court of the United States. 8 Wheaton 1; 1 Howard 316. But the remedy thus spoken of, is that which the law gives for the enforcement of contracts: within the meaning of which a mortgage security does not come. A mortgage contract is no more a remedy than the bond which accompanies it—they are both the evidence of and security for the indebtedness, and the one is as much subject to legislative alteration as the other: they are both the subject matter and the foundation of suits, and these suits as constituting the means of enforcing the one or the other contract, is the remedy afforded by the law.

The remedy is subject to legislative modification, the mortgage contract is not. Its terms were agreed upon by the parties, and they afford the rule for the measurement of the rights of mortgagor and mortgagee.

By the power contained in the mortgage, the mortgagee was authorised, upon non-payment of the money mentioned in the accompanying bond, to sell the mortgaged premises at public auction, and on such sale to execute to the purchaser a deed of conveyance in law, pursuant to the statute in such case made and provided. The statute thus referred to, and embodied in the mortgage, became as much a part of the contract as if the terms of its provision had been literally inserted therein. The statute provided, that the officer or person making the sale should execute the deed and endorse thereon the time when it would become operative in law, and deposit it with the register of deeds; that if the premises were not redeemed within two years, the register should deliver the deed to the purchaser; that the deed from the expiration of the time to redeem, should vest in the purchaser the mortgagor's interest in the premises, and that in case of redemption the register should destroy the deed.

It is impossible to read the mortgage in connection with the statute so incorporated in it, without seeing that mutual rights are provided for: that the agreement of the parties is, that if the mortgagee, in the enforcement of his rights, shall proceed under the power, that the mortgagor shall have two years from the time of the sale to redeem the premises: that until that time the deed is not to become operative, but is to remain as an escrow in the hands of the register of deeds of the county.

There is in this connection this further important consideration: that under this mortgage contract the mortgagor had the legal right, as against the mortgagee and all other persons, to continue in the possession of the mortgaged premises until his title thereto, by his failure to redeem, was absolutely gone. The act of 1843, continued in force by the Revised Statutes, prohibits the action of ejectment by the mortgagee before his title shall become absolute, upon a foreclosure of the mortgage. The right of the mortgagor, then, under his contract, is to remain in the quiet possession of the premises for two years after they shall have been sold under the power, within which time he may redeem.

This is not, as was said by counsel, a mere right of action, a remedy to re-obtain the title which he had conveyed away. It is a right of possession accompanied with the right, by an act *in pais*, to reinstate himself fully in all his original interest in the property. When, then, the legislature intermeddles and takes away from the mortgagor his legal right of possession for a year, they do not act upon any remedy which the law has provided; they act upon the agreement of the parties, and endeavour to give to a power an operation and effect different from the intention of the parties.

The object of the constitutional provision, it was said in Bronson *v.* Kinzie, 1 Howard 311, was to maintain the integrity of contracts, and to secure their faithful execution throughout the Union. The tendency and effect of the legislative provisions we have been considering are, to impair the integrity of this mortgage contract, and impose upon it an execution contrary to its meaning and the intention of the parties: and in my opinion we are in duty bound to pronounce them, so far forth, to be unconstitutional. As was said in Bronson *v.* Kinzie, of the act of the legislature of Illinois, giving to the mortgagor a right to redeem, which he had not by the contract; so we must say of these provisions of our Revised Statutes; they appear to the court not to act merely on the remedy, but directly upon the contract: for as in that case the law engrafted upon the contract new conditions, injurious and unjust to the mortgagee, so in this, the law has altered the conditions of it, injuriously and unjustly to the mortgagor.

It must be certified to the circuit court of Oakland county, that in the opinion of this court, the mortgagor has two years after the sale to redeem the mortgaged premises.

Certified accordingly.

SORREL *v.* BREWSTER.

Plaintiff wrote to defendant, "I have on hand a lot of furs, which I am anxious to sell." Defendant replied, "I have this day written to Mr. Thomas G. Raitte, of Norwalk, who is my agent, to make you a visit for the purpose of purchasing your furs, and I hope and trust that you and Mr. Raitte will be able to make a bargain for your lot of furs" Raitte afterwards called on plaintiff and purchased the furs, paying part cash and giving a note for the balance, in the name of defendant. *Held*, 1st, that defendant was liable to plaintiff for the unpaid balance, as for goods sold and delivered; 2d, that evidence offered by defendant to prove an agreement between him and Raitte, by which defendant was to advance money to Raitte to purchase furs in his (Raitte's) name, and to have a lien for his advances on the furs purchased, &c., was properly rejected by the court on the trial.

MOTION for a new trial, reserved from Wayne Circuit Court. Assumpsit by Sorrel against Brewster. The declaration contain a special count, on a note executed by one Raitte, in the name of defendant, and the common counts for goods sold and delivered. On the trial the following letters were given in evidence, to prove the agency of Raitte:

"LITHOPOLIS, April 9th, 1844.

MR. BREWSTER:

Sir—I have to say to you that I have on hand a lot of five to eight thousand fur skins, which I am anxious to sell. If you are in the fur market, you will do well to come and buy my furs. They will run two-thirds prime. There are five hundred mink, cat and fox, the rest coon. If you come at all, come the first of May. Write me, saying whether you will come or not. M. M. Sorrel."

"Defiance, Ohio, April 24, 1844.

Mr. M. M. Sorrel, Lithopolis:

Sir,—On my return to Fort Wayne yesterday from the south, I found your letter of the 9th inst., advising me that you had from five to eight thousand fur skins, mostly coon, which you wish to sell, and which I should be glad to purchase.

As my business will detain me one or two weeks yet in this country, I have this day written to Mr. Thomas G. Raitte, of Norwalk, who is my agent, to make you a visit for the purpose of purchasing your furs, and I hope and trust that you and Mr. R. will be able to make a bargain for your lot of furs. Very respectfully yours,

William Brewster."

"Defiance, April 24, 1844.

Mr. Thos. G. Raitte, Norwalk.

Sir,—* * * * * *

Annexed I hand you a copy of a letter which I received yesterday at Wayne from Mr. Sorrel, of Lithopolis, and I wish you to see Mr. S. without delay, and see if you can purchase his lot of furs, but if you cannot make a trade with him for them, I wish you to write me at Fort Wayne (to which place I shall return and remain one or two weeks), and also to Maumee City and Detroit, so that I shall get your letter at one of those places, and I will go and see Mr. S. with you, and see if I can't purchase them. If you can't buy Mr. S.'s furs, I wish you to make an arrangement with him to keep them until I can see him, as it will not do for us to lose so large a lot of furs this season.

* * * * * * *

Very truly yours,

William Brewster."

Raitte went to Lithopolis, on the first of May, 1844, and on the next day made an arrangement with the plaintiff, in the name of defendant, for the purchase of the furs. Four hundred dollars were paid at that time, and, in June following, he called for the furs, and on taking an account of them, they were found to amount to $5,853 87. Raitte said they amounted to more than he supposed they would, when he bargained for them, and gave it as a reason for not having funds sufficient with him to pay the whole amount at that time, and for giving the defendant's note for the balance, amounting to $696 87. Defendant proved an agreement between himself and Raitte, by which he was to advance money to Raitte to purchase furs, and to have a lien upon the furs purchased for the money advanced, and showed a settlement had been had between them, in which the furs purchased of plaintiff were included. This testimony was received subject to objection, and was afterwards ruled out of the case by the court. There was also evidence in regard to a custom among dealers in the fur trade to pay cash for furs, which is fully stated in the opinion of the court.

Van Dyke and Emmons, for plaintiff.

Joy, for defendant.

By the court, GREEN, J. The first inquiry which naturally arises in this case, is, what was the nature and extent of Raitte's agency, in purchasing the furs in question, as between Brewster, his principal, and the plaintiff? If we are able to arrive at a satisfactory conclusion upon this question, there will be no serious difficulty in determining the rights of the parties involved in this suit.

The only evidence of Raitte's power to act as the agent of Brewster, is found in the letters of Brewster, dated the 24th of April, 1844, one of which is addressed to the plaintiff, and the other to Raitte.

In his letter to the plaintiff, the defendant says: "On my return to Fort Wayne yesterday from the south, I found your letter of the 9th inst., advising me that you had from five thousand to eight thousand fur skins, mostly coon, which you wished to sell, and which I should be glad to purchase. As my business will detain me one or two weeks yet in this country, I have this day written to Mr. Thos. G. Raitte, of Norwalk, who is my agent, to make you a visit for the purpose of purchasing your furs, and I hope and trust that you and Mr. R. will be able to make a bargain for your lot of furs."

In his letter to Raitte of the same date, the defendant says: "Annexed I hand you a copy of a letter which I received yesterday at Wayne, from Mr. Sorrel of Lithopolis, and I wish you to see Mr. S. without delay, and see if you can purchase his lot of furs; but if you cannot make a trade with him for them, I wish you to write me at Fort Wayne (to which place I shall return and remain one or two weeks), and also to Maumee City and Detroit, so that I shall get your letter at one of those places, and I will go and see Mr. S. with you, and see if I can't purchase them. If you can't buy Mr. S.'s furs, I wish you to make an agreement with him to keep them until I can see him, as it will not do for us to lose so large a lot of furs this season."

There does not appear to be any evidence that the contents of this last letter were made known to the plaintiff at or before the time of the sale, nor is it at all material whether such was the fact or not, there being nothing in it which does not harmonize perfectly with that written to the plaintiff.

The defendant, then, must be held bound by the acts of Raitte, as his agent, to the extent to which he held him out, in his letter to the plaintiff, as being authorized to act for him. In that letter he informs the plaintiff that Raitte is his agent, and that he has written to him to make the plaintiff a visit for the purpose of purchasing the lot of furs in question, and hopes they will be able to make a bargain for them. Here is no restriction, or limitation, or condition whatever imposed upon the power of the agent in making the purchase indicated by the principal; but the fact of the agency is announced in the most general terms, accompanied by an invitation on the part of the principal to the plaintiff to bargain with the agent as such.

This case is, then, very clearly distinguishable from that class of special agencies, in which the agency is not held out by the principal, by any acts, or declarations, or implications, to be general in regard to the particular act or business. In the latter case it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. Story on Agency, sec. 133.

In a note to this section, Judge Story very justly remarks, that "the whole difficulty, in considering this doctrine, arises from confounding two things with each other, which are essentially distinct, namely, the extent of the authority given to an agent, whether it be limited or unlimited, with the nature of the agency in which he is employed, whether it be general or special. A person may be a general agent, that is, he may be employed in the general business of his principal, and yet he may be privately limited in the exercise of his agency, by certain instructions given by his principal, far within the general scope of that business. On the other hand, he may be a special agent, that is, he may be employed for a particular object only, and yet he may have an unlimited authority to act within the scope of his agency in that particular affair, or he may be limited therein by like instructions."

In sec. 133, before referred to, Judge Story illustrates the doctrine thus: "If a merchant should appoint a special agent *pro hac vice*, to buy or sell a cargo of cotton for him in his discretion, and he should, by an open letter, state that he had so authorized the agent to buy or sell on his account, and that he would ratify and confirm his acts in the premises; a person who should deal with the agent upon the faith of that letter, and buy or sell the cargo of cotton accordingly, would be entitled to hold the principal bound by the acts of the agent, although the latter might have violated his secret instructions as to the price of the cotton purchased or sold." See, also, note 2 to sec. 127, *id.*

Let us apply this doctrine, thus explained and illustrated, to the case before us. The defendant advertises the plaintiff that Raitte is his agent, and that as such he has requested him to visit the plaintiff, to purchase his lot of furs. He makes no allusion whatever to any restriction of his agent's power. He thus recommends Raitte to the plaintiff's confidence, as one with whom he may safely bargain for the sale of his furs. What, then, had any arrangement between the defendant and Raitte, of which the plaintiff had no knowledge, to do with the rights of the parties? The plaintiff has a right to hold the defendant bound by the acts of his agent, within the scope of that agent's authority, notwithstanding such agent may have acted in bad faith towards his principal, or violated any instructions, or private understanding or agreement between them. Hence, the testimony which was offered on the part of the defendant, of an agreement between himself and Raitte, in regard to the advance of moneys and the purchase of furs, was irrelevant, and the objection made to its introduction was well grounded. Putting this testimony entirely out of the case, the facts appear thus: Raitte, as the agent of the defendant, acting under a general authority for that purpose, bargained with the plaintiff for his entire lot of furs. Upon ascertaining the quantity, it appeared that they amounted to more than the parties had anticipated, and Raitte stated to the plaintiff that he had not funds enough with him to pay the entire sum to which they amounted. For the balance, it was then agreed that Raitte should give the plaintiff Brewster's due bill, which was done, and the furs were all afterwards delivered by Raitte to the defendant.

The special counts in the declaration, it is said in the argument, have been *nol prossed*, and the plaintiff seeks to recover only upon the indebitatus assumpsit count for goods sold and delivered. Upon this state of facts, is the plaintiff entitled to recover?

The objection based upon the relation existing between Brewster and Raitte, has already been disposed of. But it is further urged, that by the custom or usage of the fur trade, an agent employed in that business, could not incur a debt against his principal. In order to show such custom in this particular trade, two witnesses were examined on the part of the defendant, Mr. Abbott and Mr. Dudgeon, but he seems to have relied principally upon the testimony of Abbott, who had been engaged in the trade for many years. His testimony upon this point, as reported, is as follows: "He has known instances of agents buying furs, under peculiar circumstances, to a greater amount than they had funds. The general mode is to buy for cash, for furs are always a cash article. Never heard of furs sold for a credit. If I send a man to a place to buy furs, and he unexpectedly finds more than he or I expected, and he has not money enough, he might draw for a balance. We generally give instructions. He would not be authorized to give a note. There is nothing in the course of trade which would prohibit his getting a credit for a small balance, but it is a question of law whether he would be authorized to do so."

The agent in this case was authorized to purchase the furs. He appears to have been provided with a large sum, in money and drafts, but not sufficient to pay in full. As to the *mode* of completing the purchase under these circumstances, he had no instructions. What mode might he adopt, consistently with the usage of the trade? He could not, according to the testimony of Mr. Abbott, give a note in the name of his principal, and, if I understand the witness, he could not get a *credit* for the balance. By *credit*, however, he evidently does not mean an indebtedness due *in presenti*, because, while he says he never heard of furs sold for a credit, he also says he has known of instances of agents buying furs, under peculiar circumstances, to a greater amount than they had funds, and that if an agent had not money enough, he might draw for a balance. If he might draw for a balance, he must of necessity have power to create a debt, and though the draft were made payable at sight, yet, practically, a credit is given, and time is allowed for payment, until the draft can be presented. If the agent, then, has power to create an indebtedness in behalf of his principal, and to make a draft for the amount thereof, I see no reason why he may not create the indebtedness, and omit to draw for it, especially when he has no instructions to guide him in the particular circumstances.

The true question undoubtedly is, what is the custom of the trade under the particular circumstances of the present case? and that question does not appear to be distinctly answered by the testimony.

The fact that Mr. Brewster treated the furs purchased of the plaintiff as having been bought under the general arrangement between him and Raitte, and that he paid Raitte for them accordingly, can make no difference, so far as the plaintiff's rights are concerned.

As between these parties, the defendant, by his agent, purchased the furs of the plaintiff, and received and disposed of them for his own benefit, without having fully paid the purchase price agreed upon. Is he liable for such balance under the circumstances of this case? I think he is, and that a new trial ought not to be granted. The general mode of conducting the fur business, to which Judge Abbott refers, would seem to be, to send out agents whenever furs were to be purchased, with means to pay for them, and with particular instructions. In such cases, the person dealing with the agent would have no knowledge of the principal, or of the agency, or the powers of the agent, except such as the agent himself might disclose. The usage of a trade conducted in that manner, would, it seems to me, for very obvious reasons, be very different from that which would govern a transaction like that between these parties, where the negotiation is commenced by the parties in person, and one of them substitutes another to act in his stead, and solicits the confidence of the other party in such substitute, for the purpose of consummating a bargain.

Certified accordingly.

SIBLEY v. JOHNSON.

A certificate of the acknowledgment of the execution of a deed by a feme covert, under the act, Sess. L. 1840, p. 167, sec. 4, certifying that "separately and apart from her husband she acknowledged that she executed the same freely, and without fear or compulsion of any one," without stating that it was on a *private examination*, is void.

CASE reserved from Calhoun Circuit Court. The only question was as to the validity of a certificate of acknowledgment of the execution of a deed by a feme covert, under the act of 1840, Sess. L. 1840, p. 167, sec. 4.

The certificate was in thes words:

"State of Michigan, county of Calhoun, *ss.*—On this 17th day of December, in the year of our Lord 1842, before me, a notary public in and for said county, personally came the above Kenyon Johnson and Mary Johnson, known to me to be the persons who executed the above instrument, and acknowledged the same to be their free act and deed; and, having questioned the said Mary Johnson separate and apart from her husband, she acknowledged that she executed the same freely, and without fear or compulsion of any one."

The following is the 4th section of the act, under which the acknowledgment was taken:

"Sec. 4. That the rights of dower which any feme covert may have to any lands in the state of Michigan, shall not be passed or conveyed only by deed executed by such feme covert, and acknowledged by such feme covert, on a private examination separate and apart from her husband, that she executed the deed without fear or compulsion from any one; which acknowledgment shall be certified upon such deed, by the officer before whom it may be made."

By the court, WING, J. It will be noticed that the statute is singularly worded, and taking it literally, it would seem that by doing all that the section requires to be done, and doing those things "only," the right of dower of a feme covert would not be passed, but a reasonable construction must be put on the act, and such as would enable the wife to pass her dower by the performance of these acts, and not otherwise.

The objection made to the certificate is, that it does not show that Mrs. Johnson, "*on a private examination*," acknowledged, &c.

It was urged by the counsel for the defendant, in his argument in this court, that the certificate of acknowledgment must show either in express terms, or by implication, a compliance with every substantial requisite of the statute. And the counsel for the plaintiff, not deeming it necessary for his purposes to controvert this position, insisted that the terms, "separate and apart from her husband," and "on a private examination," mean the same thing, and that the requirements of the statute are met by the use of either term or phrase, without the other.

Similar questions have often arisen in the circuit courts of the late territory and of the present state, but I am not aware that this court has ever decided this or any similar question.

On looking into the decisions of sister states, I find they do not harmonize as to the matters necessary to be set forth in a certificate of acknowledgment of a feme covert: in other words, they do not agree in their views as to the essential elements of an acknowledgment.

In Indiana, their supreme court hold it to be the duty of the officer taking the acknowledgment of a feme covert, to examine her, separate and apart from her husband; but that their statute does not require, as they understand it, that the certificate should show anything more on the subject than the declaration or acknowledgment of the wife, that she had voluntarily executed the deed. They hold that it will be presumed, the contrary not appearing, that the officer did his duty as to the separate examination: that it is the acknowledgment only, and not the circumstances under which it is made, that is required to be certified. Stevens v. Doe, 6 Blackf. 475.

It would seem, from Gregory v. Ford, 5 B. Monroe's R. 471, that the supreme court of Kentucky have held the same doctrine.

The supreme court of Maryland decided, in the case of Flanagan and Wife's Lessee v. Young, 2 Har. and McHen. 38, that a certificate stating that a husband and wife acknowledged the land and premises in the deed mentioned, to be the right, title and estate of the grantee named in the deed, *according to the true intent and meaning of the same deed, and the act of assembly in that case made and provided,* was sufficient, and in compliance with the provisions of a statute requiring a private examination.

The same doctrine was held by the supreme court of Ohio, in a decision delivered by Wright, justice, in the case of Newcomb's Lessees *v.* Smith, Wright's R. 209.

In Pennsylvania, their courts have held with great uniformity, as to the acknowledgment of deeds by married women, that the requirements of their act of assembly, by which the mode of conveyance by femes covert is prescribed, must appear to have been substantially complied with, *on the face of the certificate* made by the magistrate by whom the acknowledgment is taken. Watson *v.* Bailey, 1 Binney 470; 5 *id.* 296; 6 *id.* 435; 4 Serg. and Raw. 272: 6 *id.* 40, 143; 9 *id.* 268; 14 *id.* 84. So in New Jersey, 4 Halsted 225.

In Maryland it has been decided that the acknowledgments of deeds of femes covert are defective unless the exact form mentioned in the acts of assembly on the subject is complied with. 1 Har. and John. 580, 751, 293; 2 *id.* 62. But as I have not access to these reports, I cannot ascertain whether the form referred to, means a form given by statute or otherwise.

In Ohio, their statute requires that the wife shall be examined separate and apart from her husband, and that upon such examination she shall declare that she voluntarily, and of her own free will and accord, without any fear or coercion of her husband, did and now doth acknowledge the signing and sealing thereof.

In the case of Brown *v.* Farron, 3 Ohio R. 152, the court decided, upon a certificate of acknowledgment in which the word "voluntary" was included, but all the words following after in the act were omitted, that the word voluntary embraced all that was intended by the other expressions omitted. The court held further, that the certificate must contain the substance of everything required by the law; that no substantial part of the provision of the statute could be dispensed with; and that it must appear expressly, or by irresistible inference from the language of the certificate, that the wife was acquainted with the nature of the deed; that she was examined apart from her husband; that she acknowledged the deed, and admitted it was her voluntary act, in such terms as to exclude the inference of fear or coercion. The court held the law was, as to the form of the certificate, directory, though, as to its substance, it is imperative; the one might be varied, the other must be adhered to. The court, however, say they place their decision principally upon considerations arising from the policy and practice of the state. The same court adhere to the same principles in 6 Ohio 142, and 13 *id.* 118.

In the case of Barton *v.* Morris, 15 Ohio R. 423, the court appear to have changed their ground, and very much relaxed this rule; and in Chesnut *v.* Shane's lessees, 16 Ohio R. 599, the court entirely change the settled rule of decision in Ohio and adopt that of the supreme court of Indiana, as stated in 6 Blackford, cited above, and say, the legislature contemplated relying upon the official oath of the officer for his faithful performance of the portion of the statute which is directory to him. In this case, Judge Reed delivers a dissenting opinion, maintaining the doctrine of their earlier decisions. It was admitted by the majority of the court, that it must appear by the certificate that the wife was apart from her husband, that he examined her, and that she acknowledged to him, &c., and he asks, why not apply the rule of presumption to every act of the officer, and permit them all to rest in presumption, and not require any to be certified? If we limit the requirements of the certificate to embrace merely the acts of the wife, all that it need contain would be that the wife acknowledged that she freely executed the deed. He insists that the term acknowledgment, in the statute, means, that the wife makes such admission under all the attendant facts and circumstances which the statute requires to make it valid and binding upon the woman, and this must appear in the certificate.

At the common law, the wife has no separate existence, she can do no legal act without the consent of her husband. With her person the husband acquires the use and control of all her property—her legal rights are merged in those of her husband. She derives her power to convey her right of dower alone from the statute, and her act has no force independent of that given to it by the statute, which is an innovation upon the common law, and the authority given is in derogation of it; and if the act is not done pursuant to the statute, it cannot prevail; not by the common law, for that does not permit it: not by the statute, because its requisitions have not been complied with.

An examination of the previous legislation of our state upon this subject, will show us the alterations made by the act in question, and assist us in giving to it a correct construction. By the Revised Statutes of 1838, p. 263, the wife was required to acknowledge before a proper officer, and apart from her husband, that she "executed such deed without any fear or compulsion of her husband." The act of 1840 provides, in addition to these requisites, that her examination shall be private, and that the wife shall acknowledge that she executed the deed "without fear or compulsion from any one."

It is a well settled principle, that if an affirmative statute which is introductive of a new law, direct a thing to be done in a certain manner, that thing shall not, even though there are no negative words, be done in any other manner. 6 Bac. Ab. 377; 6 Mass. 307. In this statute there are negative words: the acknowledgment of the wife can only be made in a certain manner.

By the act of 1838, it is apparent, it was the design of the legislature to exclude the husband, and him only, from the examination. By the act of 1840, the legislature intended further guards and protections to the rights of the wife than was contained in the former act: they intended that the wife should be free from the control, not only of the husband, but of all others, in doing what she was authorized to perform. It may be admitted, that the terms "on a private examination," might, perhaps, be held to include the idea of separation from, not only the husband, but all others: but the terms "separate and apart from her husband," do not embrace this full idea. Then, are the terms "on a private examination," because immediately followed by the words, separate and apart from her husband, to be held to mean privacy only as to the husband? Does the latter sentence qualify the former, and limit its application only to the husband? If so, though the husband be absent, his agent, or some interested person, may be present, and exercise a controlling influence over the wife, in such manner as is contemplated by the act, and which it seeks to prevent. The words of the former act effectually excluded the husband: why were the words, "on a private examination," added, if not to express something more than was meant by the former law? As, by the former law, the wife was to acknowledge that she executed the deed without any fear or compulsion of her husband, it was made a pre-requisite to such acknowledgment that she should be placed beyond the influence of his presence, by being separate and apart from him. When the legislature wish to provide for a more certain assurance of the uncontrolled action of the wife, and required that she should acknowledge, and that it should be certified that she executed the deed without fear or compulsion *from any one*, they made a corresponding alteration in the duties of the officer, and required that her examination should be private; thus excluding any and every one but the officer. And though this addition of the term private examination, may obviate the necessity or propriety of retaining the former provision, requiring separation from the husband, yet the introduction of the new term, on a private examination, and disconnecting it by a comma from the term, separate and apart from her husband, in the old law, shows that they are not understood to mean the same thing, but the former was intended to be more comprehensive than the latter, and to exclude not only the husband, but any and all others.

Then assuming, as we do, that the certificate should show that all the requirements of the statute were complied with; that the precise words of the statute need not be used, but that any equivalent words will answer, I find in this certificate no words expressive of the fact that the examination of the wife was private, except as to her husband. The new requirement of the law of 1840 seems to have been lost sight of or disregarded, and therefore this deed, so far as it respects the wife, is void.

Let it be so certified to the circuit court for the county of Calhoun.

Certified accordingly.

GOODRICH *v.* COMMISSIONERS OF HIGHWAYS OF THE TOWNSHIP OF LIMA.

Where commissioners of highways laid out and established a road, and an appeal was taken from their decision to the township board, which affirmed what the commissioners had done, a certiorari sued out for the purpose of reviewing the decision of the *township board*, directed to the *commissioners* instead of the township board, was dismissed for irregularity.

Motion to dismiss certiorari. In September, 1847, the commissioners of highways of the township of Lima, in Washtenaw county, laid out and established a highway across the land of the plaintiff, who subsequently appealed from their decision to the township board. In January, 1848, the township board, after hearing the proofs and allegations of the parties on the appeal, made their decision, confirming what had been done by the commissioners. To review this last decision a certiorari was taken out, directed to the commissioners by name, and their successors in office, and requiring them to return what plaints were "levied before them, *and the town board of said town*, in the matter of difference between Chauncey S. Goodrich, appellant, and the commissioners of highways of the town of Lima, in said county, as to the actings and doings of said commissioners in laying out and establishing a highway in said town, across the lands of said Goodrich."

——— for the motion.

Hawkins, contra.

By the court, Green, J. The only error complained of by the plaintiff in his affidavit, is, that the decision of the township board, affirming the acts of the commissioners, was illegal and incorrect, and ought to be reversed.

In the case of the Commonwealth *v.* Winthrop, 10 Mass. 177, a tax had been assessed for the purpose of repairing a highway, by the court of common pleas for the county of Somerset. Subsequently the court of sessions for that county was revived, with jurisdiction over assessments for such purposes, and the records of the court of common pleas relating to such assessments, were transferred, with such jurisdiction, to the revived court of sessions.

The writ of certiorari was issued to the chief justice of the circuit court of common pleas comprehending Somerset county, commanding him to certify the proceedings of the court relative to the assessment of said tax. A return was made to the writ by the clerk of the court of common pleas, who was also clerk of the court of sessions, for the county of Somerset, certifying the proceedings according to the command of the writ; but the court quashed the certiorari, as having issued improvidently, and ordered a new writ to issue to the first justice of the court of sessions for the county of Somerset.

So in the case of Bogart *v.* The Mayor &c. of New York, 7 Cowen 158, a *certiorari* was issued to the defendants, to remove the proceedings of the corporation of the city of New York, in widening a street, and the court held that the writ should have been directed to the judges of the supreme court, sitting as commissioners: most of the proceedings sought to be questioned, being before them as commissioners, though it was said that some of them remained with the defendants; and the writ was quashed on the ground that it was both misdirected, and not allowed on cause properly shown.

In the case now before this court, the respondents are only required to certify in relation to the matter in difference between Goodrich, *appellant*, and the commissioners. This confines them to what appeared before the township board, in the proceedings upon the appeal, for it was only there that the plaintiff appeared in the character of *appellant*, or where he and the commissioners assumed the attitude of adverse parties. Considering, also, that the only error complained of, is the decision of the township board upon the appeal, it is very apparent that all the plaintiff has sought to bring up by this writ, is the proceedings before the board upon his appeal; and it also seems very clear, that, for this purpose, the writ should not have been issued to the commissioners of highways, but that, if the plaintiff has any remedy by certiorari, to correct any error of the township board in the premises, his writ must be directed to the officers before whom the proceedings sought to be questioned remain.

The writ of certiorari in this case must be dismissed, with costs to the respondents.

Certiorari dismissed.

DAVIDSON v. GUNSOLLY.

In trover, by one having a lien on goods against the general owner, or against one who has converted the goods by his direction, the plaintiff can recover only according to his special interest; but against a stranger the full value of the goods may be recovered, although exceeding the lien, and the plaintiff will be a trustee for the general owner as to the balance. If the goods converted are of less value than the amount of the lien, no more can be recovered than their value.

The same rule prevails in replevin, under R. S. c. 124, sec. 29, p. 549, where either of the parties, at the commencement of the suit, has only a lien upon, or special interest in the goods replevied, and is not the general owner.

CASE reserved from Wayne Circuit Court.

Davidson, in person.

Van Dyke and Emmons, for defendant.

By the court, MILES, J. This was an action of replevin, for the taking and detention of a carding machine, commenced in the circuit court of Wayne county, where the cause was once tried, when the jury failing to agree upon a verdict, the subject matter of the action was submitted to an arbitrator.

For a statement of the subject matter of the suit, the parties to the submission referred to the pleadings; a copy of which were annexed to and formed a part of the submission.

The declaration was for taking and detaining one of Daggett's patent carding machines. The defendant plead: 1, not guilty; 2, property in one Henry B. Holbrook: 3, property in Holbrook and the defendant: 4, property in the defendant: 5, property in the defendant and the plaintiff. The plaintiff, it appears, claimed title as a purchaser, under a levy and sale upon execution from the circuit court against Holbrook.

By the submission it was provided, that the award of the arbitrator being made and reported within one year to the circuit court, the judgment thereon should be final; and by a stipulation endorsed on the submission, it was further agreed that the award should be entered as the judgment of the court in the case then pending; either party to have the same right to correct such judgment as if the cause was duly tried in said court.

There is a further stipulation between the parties, requiring the referee to return, with his award, all the evidence, exhibits, and matters in testimony before him, to the circuit court.

It is manifest, from an inspection of the instrument in writing, executed and acknowledged by the parties, for that purpose, that the subject matter of the suit was submitted to arbitration agreeably to the provisions of the statute. R. S. 565.

After an award was made, a motion was submitted to the circuit court, by the plaintiff, to set it aside; and a counter motion having been made by the defendant, for judgment upon it, the questions of law arising upon these motions have been reserved by the circuit court for the opinion of this court.

There are several special provisions in the submission, which require the arbitrator to state: 1, The property of the defendant in the machine according to law: 2, Its actual value at the time it was replevied, if he finds the general property in the defendant: 3, The actual damages sustained by the defendant, if he finds that the defendant had only a lien on, or a special property in the machine. 4, If he shall find that the right of property was in the plaintiff, or that he was entitled to the possession, then that he shall assess adequate damages for the detention.

The arbitrator found that the plaintiff replevied the machine and appurtenances on the 12th day of February, 1845; that it was then worth $450; that the defendant at that time did not own the general property in the machine; that he had in it a special property, and was entitled to the possession thereof for four years succeeding the 1st day of April, 1843, by virtue of a lease from Henry B. Holbrook to him; that the *fi. fa.* was levied and the sale made subject to said lease; that the plaintiff had no right to take away the machine from the defendant at the time he replevied the same, but that the defendant was lawfully entitled to the possession of the same up to and until the 1st day of April, 1847. The award is dated in December, 1847.

The arbitrator then proceeds, in his award, to assess the damages of the defendant, and, as required by the submission, to state the principle by which he arrives at the amount of the same. He says: "I further determine, &c., that the actual damages, consisting of the value of the rent and use of the machine, from the time it was so replevied from said Gunsolly by said Davidson, until the expiration of the said unexpired term, to wit, until the first day of April, 1847, independent of the question of loss of profits and injury to business, by its being so taken away, was at least two hundred and twenty five dollars. The basis upon which I so make up and find that amount being as follows, viz: that said Gunsolly could not have rented such a machine for the same space of time for a less sum; and that any one desiring the use of such a machine for such a time, would be willing to pay that price therefor; that that sum would be deemed a fair price; and that twenty five dollars would be a low and reasonable sum for taking down and putting up the same, receiving and returning it."

I have thus stated particularly this part of the submission, and of the award, for the purpose of noticing one of the objections made to it by the plaintiff, to wit, that the arbitrator has not thereby determined in whom the general property in the machine was, at the time it was replevied. If this objection is well founded, it is for the reason that the circuit court cannot know from the award what judgment to give.

In trover, by one having a lien on goods against the general owner, or one who has converted the goods by his direction, the plaintiff can recover only according to his special interest: but, in a like action against a stranger, the full value of the goods may be recovered, although exceeding the lien, and the plaintiff will then be a trustee for the general owner as to the balance—if the goods converted are of less value than the amount of the lien, no more can be recovered than their value. 7 Cowen 681, n. a; see, also, 5 Binney 457-60, showing this principle to be of very ancient origin.

The twenty-ninth section of the act relating to replevin, provides that when either of the parties to the action at the time of the commencement of the suit, shall have a lien upon or a special property in the goods, and is not the general owner, that fact may be proved on the trial, and the jury are required to find according to such fact by their verdict, and the court shall thereupon render such judgment as shall be just between the parties. R. S. 549.

This section was first enacted in 1841, Sess. L. 1841, p. 54, and is not contained in the statute of New York, from whence ours is derived.

It is said to have been intended to introduce in actions of replevin, the rules governing in actions of trover just stated. Tiffany's Treatise, p. 53.

If those rules are to apply, and I see no reason why they should not, then it seems to me the defendant might, on this award, be entitled to judgment for the value of the machine, or for a return, with damages for the detention.

But should not the plaintiff's property in the machine be ascertained to enable the court to say whether the defendant should have judgment for the damages alone, or for the value and damages, or a return and damages. If the plaintiff is the general owner by having acquired title under the sale on the *fi. fa.* against Holbrook, then the defendant is only entitled to the value of his special property; whereas, if the plaintiff is without right, the defendant is entitled to judgment for the value, or for a return, at his election. Whether the plaintiff acquired a title, must depend upon the interest of Holbrook, as he could by the purchase acquire no other or greater interest than Holbrook had. Hence, it is necessary to establish Holbrook's title, to show the property of the plaintiff.

The title of the plaintiff was put in issue by the pleadings, but is not determined by the award. That seems to be necessary, for the reasons just stated.

I have been somewhat embarrassed in the examination of this case, by the special provisions in the submission, and by the consideration that they might be intended to control the effect of the general submission of the subject matter, but, upon reflection, have come to the conclusion that, although they point out the duty of the arbitrator in certain particulars, they do not specify his whole duty, and that the submission would be equally well without them. I refer to the directions as to the assessment of damages in the event of finding a property in the defendant, or in the plaintiff, either general or special. It is unnecessary to inquire whether the suit was or was not discontinued by the submission: enough appears to show the intention of the parties, that the case should be tried before the arbitrator upon the rules of law applicable to the action of replevin, which was pending at the time of the submission.

Having determined that the award is defective in the particular alluded to, the next inquiry is, how is it affected by such imperfection? The powers of the court designated in the submission, to control the award, are prescribed in the ninth section of the act concerning arbitrations—it may either vacate, or modify and correct. One ground of an application to vacate, is, that the arbitrator so imperfectly executed his powers that a mutual, final and definite award on the subject matter submitted, was not made. If we are correct in the view we have taken of this matter, here was an imperfect execution of the powers of this arbitrator. The whole subject matter of the suit was submitted to him: he was sufficiently instructed, so far as the parties could do it by special directions and stipulations, and with every legal intendment in favor of the award, and in the exercise of all that liberality which we are bound to exert in its construction, it seems still radically defective.

There are other objections to the award made in the case, but as the one decided disposes of it, and as its many peculiarities have rendered the investigation of the questions involved somewhat difficult and embarrassing, I do not feel called upon to express an opinion on the other points, though all of them have been examined—trusting that the parties may never be under the necessity of again bringing the case into this court in its present shape.

Certified accordingly.

In the Matter of Mills, an Attorney.

R. S., c. 95, sec. 34, provide that any attorney, solicitor or counsellor may be removed or suspended, who shall be guilty of any deceit, malpractice, crime or misdemeanor. The court may remove or suspend an attorney for other causes than those mentioned in the statute, which is not to be construed as restrictive of the general powers of the court over its officers.

A charge made against an attorney for the purpose of removing him, that he is of notoriously bad character, not to be believed under oath, and unworthy to practice as an attorney, is too general. Specific acts should be charged, so as to give the respondent an opportunity of answering them.

But a charge that the reputation of an attorney for truth and veracity is so notoriously bad that he is not to be believed under oath, contains good cause for removal, and is not too general.

By the court, WHIPPLE, C. J. This case comes before the court upon questions reserved by the circuit judge of the county of Kent.

Charges, affecting the professional and moral character of the respondent, were filed by Charles P. Babcock against Mills, in the circuit court of the county of Kent. Among these charges were the following:

1. "That said Mills is of notoriously bad character, not to be believed under oath, and unworthy to practice as an attorney."

2. "That the reputation of said Mills for truth and veracity is so notoriously bad, that he is not to be believed under oath."

Testimony was taken in support of each of these charges. It being objected by the respondent, that they were too general and indefinite in their character, and that, if true, they would not authorize the court to revoke his license, the circuit judge deemed it proper to ask our advice in respect to the objections thus raised. By the Revised Statutes, chap. 95, sec. 26, it is provided that "No person shall practice as an attorney or counsellor at law (except in the county court), or as a solicitor or counsellor in chancery, within this state, unless he shall be approved by the court for *his good character and learning*." The 27th section authorizes the supreme court to "grant to any citizen of this state, of *good moral character*, and of the age of twenty one years, a license to practice as an attorney and counsellor at law, upon an examination at a stated term of such court, in the presence of the justices thereof, when satisfied that the applicant possesses sufficient legal learning and ability to discharge the duties of such office." The 34th section provides that "Any attorney, solicitor or counsellor, may be removed or suspended, who shall be guilty of any deceit, mal-practice, crime or misdemeanor."

The pre-requisites necessary to admission at the bar, are, *first*, that the applicant shall be approved by the court for his *good moral character*; and, *second*, that he possesses sufficient *legal learning* to discharge the duties of his office.

The authority of the court to remove or suspend an attorney when guilty of any deceit, mal-practice or crime, exists independently of the statute. Whether this authority to revoke a license granted to an attorney, extends to causes other than those specified in the thirty-fourth section, is now, for the first time, presented for the consideration of this court.

If our courts are restricted to the causes set forth in the statute, there would seem to be a lamentable defect in our laws. The words "deceit" and "mal-practice," in the statute, have direct reference to the conduct of an attorney, as such attorney; and if the authority of our courts to remove or suspend an attorney is to be thus restricted to *official* delinquencies, it follows, that however degraded his moral character may be—whatever fraud or deception he may be guilty of—if such fraud or deception is unconnected with his *professional* acts, he is deemed worthy of a place at the bar. In other words, an individual may be guilty of acts which involve a violation of every moral precept, and yet retain our license, and practice in our courts, provided these acts were committed in his *private*, and not *official* capacity.

If it is of consequence to the community that those who are in any way concerned in the administration of justice, should possess a reputation unstained by those vices which in their nature tend to degrade and corrupt, then is it important that a power should be lodged in some tribunal, to purge the bar of such as may have become the victims of such vices. That no person can faithfully and honorably discharge the delicate and responsible duties of an attorney, unless fortified by strong moral principles, is too clear for argument. The *nature* of those duties necessarily implies the possession of high moral character, in order to their conscientious performance. This our statute contemplates, for it is only to those who are "approved by the court for their good character," who are permitted to wear the honors and bear the responsibilities of an attorney.

If it be necessary, to gain admission at the bar, that a person should furnish the evidence of "moral character," as required by the twenty seventh section, how infinitely greater the necessity, that he should actually possess that character, when he shall have entered upon the active and exciting theatre of professional life, where he is beset at every moment by temptations, well calculated to test the firmness of his principles.

It cannot be contended, with reason, that while our courts are clothed with the authority to revoke the license of an attorney who may be convicted of a *misdemeanor*, that they are powerless when that authority is invoked in respect to an attorney who may be convicted of immoralities which utterly unfit him for the association of gentlemen, and the faithful discharge of his duties, either to his clients, or to the court in which he may practice.

Can it be that an attorney, convicted of a petty offence in no wise involving moral turpitude—one who may have adorned the profession by his talents, his eloquence and his learning—may be expelled from the bar; while another, whose reputation may not have extended beyond the limits of the township in which he resides, and whose character may be stained by gross immoralities, is permitted to appear as a counsellor and advocate in courts of justice? Such a state of things would result, if the views taken by the respondent be correct.

As it is a condition precedent to his admission at the bar, that an attorney should possess a blameless moral character, I think he forfeits his rights as such attorney, upon a breach of that condition. When a license is granted to an attorney, we certify to the world, that he has been "approved by the court for his good character and learning." Upon this certificate the public have a right to rely. They may fairly presume, so long as the attorney retains his office, that his "good character" continues to be "approved by the court," and that they may safely rely on his honor and integrity.

Should this court, after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would, in my opinion, fail in the performance of a duty cast upon them by the law. It is a duty they owe to themselves, to the bar, and the public, to see that a power which may be wielded for good or for evil, is not entrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public, who have a right to demand of us, that no person shall be permitted to aid in the administration of justice, whose character is tainted with corruption.

Upon principle, therefore, I think that the authority of this court over attorneys ought not to be restricted to the cases specified in the statute. And the reasoning by which I am conducted to this result is conclusive to show, that the legislature never intended to withhold from our courts the exercise of a power so necessary to preserve the administration of justice from pollution, and the public from imposition.

Let us now examine the question presented for our consideration, with reference to adjudged cases to be found in the English and American reports.

In ex parte Brownsall, Cowp. 829, an application was made to the King's Bench, to strike the defendant's name from the roll of attorneys, he having been convicted of stealing, five years before the application, and no misconduct *since* having been imputed to him. Lord Mansfield remarked, that as it was for the dignity of the profession that a solemn opinion should be given, he would take an opportunity of consulting all the judges. At a subsequent day, he stated that he had consulted all the judges, and they were unanimously of opinion that the defendant, "having been burnt in the hand, is no objection to his being struck off the roll; and it is on this principle, that *he is an unfit person to practice as an attorney.* It is not by way of punishment, *but the court, in such cases, exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.*"

In the case of the King *v.* Southerton, 6 East. 127, the defendant had been indicted and convicted for sending a letter to extort money, &c. Judgment was afterwards arrested, on the ground that the offence of which the defendant had been convicted, was not cognizable by the laws of the country. Lord Ellenborough, Chief Justice, however, remarked, "that enough appeared to the court to satisfy them that the defendant *was a very improper person* to remain as an attorney on the rolls of the court." Appropriate proceedings having been instituted, the defendant's name was stricken from the roll.

In Smith's case, 1 Brod. & Bing., 522, the defendant, an attorney, was stricken from the roll "for supporting his clerk in swearing falsely (as bail) that he, the clerk, was a lace manufacturer."

It has been held by the supreme court of Ohio, that "official delinquency and *base* immorality" will constitute a good ground for revoking the license of an attorney. 11 Ohio 430. The statute of Ohio authorizes the supreme court or court of common pleas to suspend any attorney or counsellor at law from practising in their respective courts, "*for misconduct in office, or for good cause shown.*" It is not apprehended that this last cause was intended to enlarge the powers which every court has over the conduct of this class of officers. The words, "for good cause shown," must, according to every sound rule of construction, refer to such causes as would, according to law and the practice of courts, justify the exercise of this power.

In Leigh's case, 1 Munf. 481, Judge Roane, in speaking of attorneys, says: "In order to secure a due degree of probity and knowledge in their profession, so indispensable to persons acting in that character, none are *permitted* to act as such but those who are allowed by the judges to be skilled in the law, and certified by the court of the county of their residence to be persons of honesty, probity, and good demeanor. Having obtained the sanction of these two tribunals, touching these two particulars, an attorney is *licensed* or *allowed* to practice; and the court have also a *continuing control over them*, with power to revoke the licenses for *unworthy* practice or behavior."

In the case of Levi S. Burr, an attorney, reported in 1 Wheeler's Crim. Cases, 503, Judge Cranch has examined, with great learning and ability, the whole ground upon which the authority of courts to strike attorneys from the roll, rests, and the nature and extent of that authority. The question was distinctly presented, and argued by able counsel, whether the court was limited to the investigation of such charges as related to the defendant's conduct as an attorney. In discussing this question, Judge Cranch puts the following inquiries: "Can it be said that if an attorney should be convicted of highway robbery, or larceny, or forging, or any other infamous crime, or *grossly dishonest conduct*, the court must close its eyes—must refrain from inquiry? Is not the respectability of the court, in some measure, connected with that of the bar? A regard to the purity of the administration of justice demands that the bar should be pure and honest, and, if possible, highly honorable." Having found the defendant guilty of several charges, relating as well to his *private* as *professional* conduct, Burr was suspended.

I have been referred to the case of *James Stryker*, (1 Wheeler's Criminal Cases, p. 330), as containing doctrines adverse to the views I have expressed in this opinion. It is certainly true, if the conclusions of the recorder in that case be correct, that the authority of courts over attorneys, can only be exercised when the acts complained of relate to his conduct as attorney, or where he has been guilty of a crime "which would disqualify him from being a witness upon oath." The weight to be given to this authority, must depend upon the strength of the reasoning by which it is supported. That reasoning I shall have occasion to examine in the progress of this opinion.

In the case of Smith *v.* The State of Tennessee, it was held to be good cause for striking the name of an attorney from the roll, that he had killed another person in a duel. 1 Yerger 228.

Without multiplying authorities in illustration of the principle I am seeking to establish, I propose now to apply those already cited to the question immediately before us. The allegation, that the defendant "is of notoriously bad character," is, I think, too general. Specific acts should be charged, so as to give the respondent an opportunity of answering them. It would be unsafe to sustain a charge in this general form, as a wide difference of opinion exists as to what constitutes a good or bad character. What one person may regard as virtuous, another may consider vicious.

The other charge, I do not think is obnoxious to this objection. It is certain and specific, and alleges, that the reputation of Mills for truth and veracity is so notoriously bad, that he is not to be believed under oath. If this charge be sustained, will it authorize the circuit court to suspend or revoke the license heretofore granted to the respondent? It is not questioned, that if evidence to support such a charge had been adduced to the court when Mills presented his application for a license, that it would have been denied him. He would have been told, that a person whose reputation for truth and veracity was so bad, as that he would not be believed under oath, was an unsafe depository of a power to act as a public attorney: that such a power could only be entrusted by courts to those who sustained "a good moral character." If this be so, is it consistent with reason or policy, to allow a person to retain a license who may have become infamous *after* it is granted? The oath which he has taken, binding him to a faithful discharge of his duties, is no longer obligatory on his conscience: for a person, whose reputation is thus condemned, will not hesitate, when prompted either by his interests or his passions, to violate that oath.

If an attorney be guilty of the crime of perjury, courts do not hesitate to declare his office forfeited: and this for the reason, that no confidence is to be placed in his veracity. The fact being established by the verdict of a jury, that he has once committed perjury, he is no longer permitted to give evidence in a court of justice—all confidence in his veracity is destroyed—the legal inference is, that having in a single instance stated an untruth while under the sanctions of an oath, he would, without any compunctions of conscience, repeat the offence.

Is an individual, whose conduct in life is such as to warrant the general belief that he would commit the crime of perjury, entitled to any more confidence than the person who may have been legally convicted of that crime? The distinction between the supposed cases consists in this, that the unworthiness of one has been pronounced by the verdict of a jury, and that of the other by the concurrent testimony of those who have been the daily witnesses of his conduct: the infamy of one may have been established by false witnesses—the witnesses by which the infamy of the other is established are his *acts*, which cannot lie.

Again: Let me suppose the defendant put upon the stand as a witness. After rendering his testimony, a cloud of witnesses, composed of his immediate neighbors, are next called to the stand, and all agree that his reputation for truth is so bad that they would not believe him under oath. Now, upon such testimony, a verdict that he is guilty of perjury cannot be pronounced against him, and yet the court would instruct the jury that his testimony is unworthy of belief, unless corroborated by that of other witnesses whose characters are unimpeached. And, unless thus corroborated, he stands upon no better moral footing than the convicted felon.

If these views be just, the inference seems irresistible, that if the respondent is such as is described in the last charge, a power resides in the court of withdrawing the license or permission heretofore granted to him. I perceive no hardship in subjecting the defendant to a trial on this charge. It calls upon him to defend his reputation against a charge which may be easily repelled, if that reputation stands fair in the community in which he dwells. It is often more difficult to defend one's self against particular charges of falsehood or of perjury, than against a general charge like that preferred against the respondent.

A man who bears an honest name is always ready to repel an as-sault upon his general character. No argument in favor of the respondent can be deduced from the fact that other public officers are not subjected to removal, except for *official* misconduct. In their cases a remedy is provided: their appointments are for limited periods, when their conduct is subjected to the scrutiny of the appointing power. But in the case of attorneys, their right to exercise the functions of their office continues during good behaviour.

I do not wish to be understood as affirming, that for every moral delinquency, the court would be authorized to revoke the license of an attorney. In the exercise of a sound discretion, the court should only entertain such as are in their nature gross, and unfit a person for an honest discharge of the trust reposed in him.

In the case before us, I am of the opinion that, if the charge I have been considering is made out by proof, that the respondent has forfeited his office; that if fully established, it necessarily implies a baseness of character which disqualifies him for discharging the duties of his office with that faithfulness and integrity so necessary to preserve the honor of the profession from reproach, the public from imposition, and the administration of justice from impurity.

Green, J., dissented, as to the sufficiency of the second charge, deeming it too general; but in all other respects concurred in the opinion of the court.

CAMPAU ET AL v. CHENE ET AL.

In equity, the statute of limitations, or objections in analogy to it upon the ground of laches, may be taken advantage of by demurrer; and if there be any ground of exception within the statute to prevent the bar, or ground to rebut the presumption arising from length of time, it should be stated in the bill.

The rule extends to a bare equity against an equity, and is not limited to the enforcement of an equity against the legal estate.

A conveyed a farm to B, his son-in-law, in consideration of $2,500. By the same instrument, B bound himself to pay the debts of A, especially a mortgage on the farm, and to account to A for the balance of the $2,500, after paying the debts; and B promised and obligated himself, besides the payment of the $2,500, to board, lodge and clothe A, in health and in sickness, during his natural life, &c., and A reserved to himself the right to live with B, and for the security of the payment of $2,500, and the fulfilling of the "clauses and conditions" above stated, B was not to give, alien, exchange or sell the farm without the permission of A, and the farm was to stand hypothecated till the payment in full of the $2,500, when A was "to release the present mortgage in a legal manner." *Held*,

1. That the deed was neither a deed of trust, nor upon condition; but that it was an absolute deed, incorporating within it a lien, in the nature of a mortgage, to the grantor for the $2,500 consideration money.
2. That the undertakings on the part of the vendee were personal covenants, and not conditions of the grant.
3. That if the covenant against alienation could be considered a condition, it was void.

CASE in chancery, reserved from Wayne Circuit Court. A bill was filed in that court on 22d November, 1847, by a part of the heirs at law of John Baptiste Campau, deceased, against other heirs of said Campau, and the devisee of Gabriel Chene, deceased, to set aside the following deed from Campau to Chene, dated 27th of May, A. D. 1800:

"Before the undersigned witnesses, was present Jean Baptiste Campau, of the township of Hamtramck, county of Wayne, in the territory of Michigan, who acknowledges to have sold, conveyed and made over, and by these presents do sell, convey and make over, from this day and for ever, to Gabriel Chene *alias* Cahousa, his son-in-law, the present accepting purchaser, for himself, his heirs and assigns, the farm or land on which the said Jean Baptiste Campau now lives, together with all the moveables, consisting in the articles mentioned and specified in the annexed inventory to these presents; also all the buildings thereon erected, seeds in the earth, &c. In a word, all that is now to be found on said farm, without excepting nor reserving any thing whatsoever, for and in consideration of the sum of one thousand pounds, New York currency, equal in value to two thousand five hundred dollars, legal currency of the United States: that the said Gabriel Chene *alias* Cahousa, promises and obligates himself to pay in the manner following, viz: The said Gabriel binds himself to pay the debts of the said Jean Bte. Campau, especially a mortgage that the Baby family holds against said farm; and when the debts are paid, if any balance remain, the same shall be paid to said Jean Bte. Campau, or to his heirs, by giving to said Gabriel a good and lawful discharge therefor; it being well understood that said Gabriel is from this time answerable for these debts; and that, should he neglect to discharge them immediately, he will be bound to pay all damages and interest accruing therefrom. The said Gabriel promises and obligates himself, besides the payment of the said one thousand pounds, to board, lodge and clothe the said Jean Baptiste Campau, in health and in sickness, in a reasonable and decent manner during his natural life, and after his decease to cause him to be buried decently, and have the usual prayers of the church said.

"The said Jean Bte. Campau reserves to himself the right to live with the said Gabriel Chene, his son-in-law, or with any other person he may please; and, in the latter case, the said Gabriel shall be bound to pay him a reasonable board, and continue to furnish him the necessary and proper clothing, as well as to have him attended to in case of sickness; as long as the said Jean Bte. Campau shall live with the said Gabriel, his son-in-law, he will, in no wise, be obliged to work, and if he does it, it will be of his own will and accord.

"The said Gabriel further promises and obligates himself to keep, at his house, Archange Campau, to board and clothe her decently, until she has reached her majority—that is, eighteen years complete.

"And for the security of the said payment of one thousand pounds, in the manner above mentioned, and for the fulfilling of the clauses and conditions here above expressed, the said Gabriel connot give, alienate, exchange or sell the said farm or land, nor all the moveable articles mentioned and specified in the said inventory, without the permission or assent of the said Jean Bte. Campau, and the whole shall remain and stand hypothecated till the payment in full of said one thousand pounds.

"The said farm or land is the same that said Jean Bte. Campau had from his father and mother, and forms a portion of the nine arpents of the first concession of the governor and intendant of New France and of Louisiana. It consists in three arpents in front by eighty in depth, bounded on the west south-west by the farm of Jacque Campau, and on the east north-east by the farm of Simon Campau.

"It is well understood, stipulated and agreed between the parties, that the said Gabriel Chene assumes only to pay the debts contracted to this day by the said Jean Bte. Campau, not exceeding the said sum of one thousand pounds, New York currency, and that he will not be bound to pay any debts that the said Jean Bte. Campau may contract after the date of these presents. That the said Gabriel Chene, in paying the above debts, shall take receipts from the different creditors, and that said Jean Bte. Campau will receive the said acquittances in payment of the above sum of one thousand pounds; and that when the said payment is made in full, the said Jean Bte. Campau, his heirs or assigns, shall be bound to appear at the office of the register of the county, to release the present mortgage in a legal manner.

"Done and passed at Detroit, &c."

The bill stated the farm in question descended to John Bte. Campau from his ancestors, and was by his ancestors rightfully obtained by grant from the constituted authorities of La Nouvelle France and Louisiana (so called), in times of great antiquity, and when this country appertained to and formed a part of said government: that being old and infirm, he resolved to sell and transfer the farm and his personal property to some member of his family who would, in consideration thereof, pay the debts he was owing, not exceeding one thousand pounds, New York currency (equal to $2,500), and maintain and support him during life: that on 27th May, 1800, the aforesaid deed was made and entered into between him and Gabriel Chene, his son-in-law, who took possession of the property, and who continued to occupy the farm until his death, when his son Gabriel Chene, one of the defendants, took possession of it as devisee under his father's will, and still continued to occupy it: that John Bte. Campau died on 18th April, A.D. 1819, and Gabriel Chene, senior, on the 1st February, 1831; and that the latter did not pay the debts of the former, or furnish him in his life-time suitable clothing, lodging and board, but wholly failed to comply with the terms and provisions of said deed of conveyance: that in 1821, after the death of John. Bte. Campau, Chene, senior, proceeded to prosecute his claim to the farm before the commissioners of the United States, acting under and by virtue of an act of Congress, entitled "An act to revive the powers of the commissioners for ascertaining and deciding on claims to land in the district of Detroit, and for settling the claims to lands at Green Bay and Prairie du Chien, in the territory of Michigan," approved May 11, A D. 1820, and that the same was confirmed to the heirs of said John Bte. Campau, to be held by them in fee, subject to all legal and equitable claims thereto of the said Gabriel Chene, senior: that the proceedings of the commissioners were afterwards confirmed by Congress, and that the commissioner of the General Land Office had decided not to issue a patent until the rights and equities of the complainants and defendants should be judicially settled. The bill prayed the deed to Chene, senior, might be canceled, the rights of the complainants be declared and defined, and for an account of rents and profits.

The defendants demurred for want of equity; and also because it appeared by the bill that Chene, senior, and those claiming title under him, had been in the exclusive and uninterrupted possession of the farm from the year 1800 down to the time of filing the bill.

Fraser, for the demurrer.

Backus, contra.

By the court, WING, J. The case made by the bill is based upon the supposition that the deed from Campau to Chene is a deed of trust, or a deed upon conditions, and in consequence of the failure of Chene to perform the conditions, it ceased to be operative and binding upon Campau. It is alleged, in the bill, that immediately after the execution of the deed, Chene entered into the possession of the farm, and he and his descendants have continued in possession ever since. It is not alleged, nor does it appear, that Campau or his heirs ever commenced any legal or equitable proceedings to take advantage of the alleged forfeiture, or that they have attempted to enter for conditions broken.

Campau died in 1819, and Chene died in 1831. It is, however, alleged that there was almost an entire failure on the part of Chene to comply with what are called conditions in the deed; and this is referred to a period immediately after its execution. And now, after the lapse of forty seven years, this bill is filed for the purpose of having the deed set aside, and to have the equities of the heirs of Campau and Chene settled.

The demurrer to the bill, as is claimed by complainant's counsel, admits all the facts well stated in the record. Lube's Equity, 286; Har.

Ch. R. 8; but the conclusions of law are not admitted. 1 Ves. Jur. 78.

One of the objections urged by defendants under the demurrer is, *lapse of time.*

It will be found, upon examination of the authorities, that the principles by which courts of equity have been governed in cases where lapse of time has been urged as a defence to a bill, were settled and clearly defined at an early period in the history of equity proceedings. Lord Camden, in declaring his judgment in the case of Smith *v.* Clay, 3 Brown's Ch. R. 699, in note, lays down the doctrine thus: "A court of equity, which is ever active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is *passive*, and does nothing." He further remarks, that "laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court. But as the court has no legislative authority, it could not properly define the time of bar by a positive rule, to an hour, a minute or a year: it was governed by circumstances. But, as often as parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the court of chancery adopted that rule and applied it to similar cases in equity. For where the legislature had fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation,) to countenance laches beyond the period that law had been confined to by parliament; and therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar."

In the case of Bond *v.* Hopkins, 1 Sch. and Lef. 429, Lord Redesdale maintains the same doctrine, and held, that if the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. The same judge, in Hovenden *v.* Lord Annesley, 2 Sch. and Lef. 632, again sustains the same doctrine in all its length and breadth.

In the case of Miller *v.* Mitchell, 1 Bailey's Ch. R. 437, which was a suit by a creditor against the pecuniary legatees of his debtor, to refund their legacies for payment of his demand, on the ground of the insolvency of the executor, it was held, the suit was barred by lapse of time, in analogy to the statute of limitations; and the court say, they "will not only apply the statute of limitations in cases of mere equitable titles and demands, but in cases of purely equitable cognizance would also give effect to lapse of time as a bar in analogy to the statute."

In 1 Hill Ch. R. 213, Prescott *v.* Hubbell *et al.*, the court say, lapse of time in equity, in analogy to the statute, is a bar to relief for fraud. 3 P. Will. 143.

In Beckford *v.* Wade, 17 Ves. 86, the court admit of no exceptions to do away with the operation of lapse of time, but such as are mentioned in the statute of limitations; and this is accomplished by their own rules, independent of the statute, which only furnishes a convenient measure for the length of time that ought to operate as a bar in equity of any demand.

This doctrine was again fully considered and maintained in the case of Cholmondeley *v.* Lord Clinton, 2 Jac. and Walker, 137, 150, on appeal to the House of Lords. All the cases were reviewed, and Lords Redesdale and Eldon affirmed this doctrine.

In the case of Winchcomb *v.* Hall, 1 Ch. Ca. 39, 40, the court refused, after twenty years, to relieve against a deed fraudulently obtained of the father of plaintiff.

In the case of Chalmers *v.* Bradley, 1 Jac. & Walker, 63, the Master of the Rolls says, calling for accounts is always much discouraged after the death of the accounting party, if he lived long enough to have accounted in his life-time. In that case, the person seeking an account had laid by nineteen years after she came of age, and prayed for accounts against representatives in the third degree. In this last case the doctrine of presumptions in courts of chancery is fully considered. In the present case, Campau lived nineteen years after the alleged breach of condition, and the litigation is now between heirs in the second degree.

But courts of equity will refuse relief, where no statute bar exists, *on general principles*, where a party has slept on his rights, and they have so held where the statute would not constitute a bar. 2 Jac. & Walker

138, 150; 1 McLean 164, 103; 2 *id.* 396; 10 Ohio R. 25, 26; 3 McLean 82; 2 Am. Ch. Dig. 108: 2 Story's Eq. 735-6-7; 2 Sch. & Lef. 637-8; 9 Peters 416; 4 Dessaus. 91; 2 Ves. Jur. 11; 8 Ohio R. 40, 159; 1 Howard 193, 161; 1 Story's R. 204; 2 Barbour's R. 595; 17 Wendell 405; 20 *id.* 443: Har. Ch. R. 285; Story's Eq. Pl. 389; 2 Sumner 212; 10 Wheaton 152.

But it is insisted, that stale demands not recognized in a court of chancery are where the complainant seeks to enforce an equity against the legal estate of a defendant, not where the complainant, having the basis of a legal title, seeks to have the equity of the defendant declared: that the rule is not applicable in the case of a bare equity against an equity. But no cases are cited which show that the rule has such limitation.

The claimants assume that they have the basis of a legal title in the confirmation of the board of commissioners of private land claims. On the face of their bill they assert that Campau the elder had a legal title, derived from the French government, which he conveyed to Chene. True, they say it was a deed of trust, or a deed upon condition. Still, the legal title would pass to Chene, if this was true, and thus have invested him with not only the basis of title, but the actual legal title. The act of congress which conferred upon the commissioners their powers, would not authorize them to divest this title and give it to another, but only to recognize and confirm it. Under the law and the treaty, they could not do otherwise, if claim was made and the title produced before them. But complainants' counsel assumed, in the argument of this cause, that Campau never had such legal title, and that all the right either party could have, was the right to claim under the act of congress a donation from the government, and that this right was a bare equity.

It may not be necessary in this place to discuss the nature of the titles by which the French settlers in this country held their lands. The several acts of congress certainly recognized a title to something connected with the land, as passing by deed, previous to a patent from the United States, in cases where no grant was shown from any government: for confirmations were made to individuals upon proof of cultivation and possession of others, the right to which passed by deed to claimant, and was perpetuated by him; and whoever derived that kind of title by deed from others which the government recognized as forming the basis, or in part the basis of their grant, would have the basis of a legal title.

In this case, whether Chene traced his title from the French government through Campau, or had a valid claim to title under the law, founded upon the occupation of Campau and himself, he had the basis of title. The question, then, was, whether the deed from Campau was an absolute deed. The proceedings of the commissioners were referred to in the course of the argument, and upon examination of the decision of the majority of the board, it appears they felt doubts as to their authority to confirm the farm to Chene, because the claim was made by Chene in the name of Campau, though to his own use. They appear also to have doubted (at the least one of them did) what was the precise character of the deed from Campau to Chene, and they express their conviction that their board was not organized with a view to the determination of questions of the character presented: they therefore confirm the claim to "the heirs of Campau, subject to the just, legal and equitable claims of Chene."

It is true, the only claim ever made was made in the name of Campau, but by Chene, and so far as the farm was concerned, it was so claimed to Chene's use, and this probably arose from considerations not now known, for the claim embraced lands to which Chene never pretended to have a title. Had the commissioners understood the deed to be an unconditional deed, it is highly probable there would have been no difficulty in confirming the farm to Chene. Therefore, under the confirmation, the person having by it the basis of legal title is dependent upon the construction which may be put upon the deed.

But assuming that this is a case of a bare equity against an equity, when did the equities of the parties arise and acquire a definite character, if ever? If we assume what is substantially asserted in the bill, we say it arose immediately after the execution of the deed. But if we assume that it could not arise until there was a legal right upon which it was founded, then these equities arose so soon as the first act of congress was passed authorizing a confirmation of title to those who themselves, or by those through whom they claimed title, had continued to occupy and cultivate lands from 1796 to 1807: for upon proof of continued occupation and cultivation according to the statute, the legal right to a confirmation was perfect under the law—the commissioners could not choose but confirm such claim. It was as perfect as it is now, and as it has been since the confirmation: for the legal title, strictly speaking, is still in the government. The confirmation is an advance in the stage towards a title, but it is still one step short of a title.

Then counting from 1809, thirty-eight years elapsed prior to the commencement of this suit, and from the confirmation in 1823, upwards of twenty-five years had elapsed. If there is any limitation in analogy to the statute of limitations of this state, this suit is barred, and the same result would follow upon the principles of a court of equity applicable to this case, independent of the statute. It is a stale claim: the grantor in the deed lived nineteen years after a breach in the supposed conditions of the deed is alleged to have occurred: and for aught that appears in the bill, there was not during that period any obstruction to the enforcement of his rights or equities as against Chene. In the mean time, and from 1800, Chene and his descendants have been in the quiet possession of the farm, and claimed and held it as their property in fee and have in no wise recognized any right of Campau or his heirs in the same—on the contrary, the elder Chene devised it in fee to his son.

All the reasons which could operate in any case to prevent a court entertaining a bill to recover a stale demand, exist in full force in this case. The testimony taken by the land commissioners, shows that the matters to be proved occurred upwards of forty-five years ago. And very many of the witnesses are dead, as well as the parties who could properly superintend the investigation of the truth of the matters alleged. The complainants and their ancestor have slept on their rights, whatever they may have been; have acquiesced a great length of time, and have shown no diligence.

We now turn to an examination of the statutes of limitations of this state, so far as they have a bearing upon this question.

By the statute of 1820 (which was the first), Laws of 1820, p. 245, sec. 6, all real and possessory actions are limited to twenty years. It is declared, that " no persons having right or title of entry into houses, lands, tenements, or hereditaments, shall hereafter thereinto enter, but within twenty years next after such right of entry shall accrue, or have accrued." The statute of the 5th of November, 1829, provides, that "no writ of right or other real action, no action of ejectment, or other possessory action of *whatsoever name or nature*, shall hereafter be sued, prosecuted or maintained for the recovery of any lands, tenements or hereditaments, *if the cause of action has now accrued*, unless the same be brought within ten years after the passing of this act, any law, usage or custom to the contrary notwithstanding." Laws of 1833, p. 408, sec. 1. The laws of 1838 on this subject, are prospective, except so far as the former statutes are declared to be the governing rule as to past cases. The statutes of 1820 and 1829 furnish the rule governing all cases accruing under them. This is the construction which has been put upon the act of 1838, in the case of Lastley *v.* Cramer, 2 Doug. Mich. R. 307; and see the case of Joy *v.* Thompson, 1 Doug. Mich. R. 373.

The defendants have sought to take advantage of lapse of time by demurrer: and it seems now to be conceded as quite clear, that the statute of limitations or objections in analogy to it, upon the ground of laches, may be taken advantage of by way of demurrer. If the complainant has any ground of exception within the statute to prevent the bar, or ground to rebut the presumption arising from length of time, then the bill should state it, and it would not be demurrable. Hovenden *v.* Ld. Annesley, 2 Sch. & Lef. 637-8; Foster *v.* Hodgson, 19 Ves. 180; 12 Peters 686; Hoar *v.* Peck, 6 Simmons 51; 7 Paige 195; Story's Eq. Pl., secs. 503, n. 4, 484, 571; Har. Ch. R. 279.

If a complainant merely states a claim founded on such a distance of time as that the court upon the analogy it has adopted with respect to the statute of limitations will refuse to assist, he may then be considered as having stated himself out of court, and he may be told that if any peculiar circumstances existed in his case, which would have entitled him to relief, he ought to have brought them forward upon the record. See note to Bro. Ch. R. 529. In this case, no facts are stated which account for the delay, or which bring the case within any of the exceptions of the statute, or which rebut the presumption arising from length of time.

With a view to settle all the points fully presented by this case, we will now proceed to an examination of the deed, to ascertain, if possible, its true character. Is it a deed of trust, or a deed upon condition? No question is made as to the instrument being a deed. It has every requisite as to parties, consideration, words of grant, &c., and it is executed with all the solemnities requisite to make it a good and valid deed. After stating the names of the grantor and grantee, we have the granting clause; then the description of the land and personal property granted; and next the consideration, which is stated to be "one thousand pounds New York currency," equal in value to two thousand five hundred dollars, legal currency of the United States; and the deed provides:

1. That the said Gabriel Chene, *alias* Cahousa, promises and obliges himself to pay in manner following, viz: Chene binds himself to pay the debts of Campau, and especially Baby's mortgage on said farm; and if there is any balance, it is to be paid to Campau, he giving a good and lawful discharge therefor.

2. It is then stated: it being well understood that said Gabriel is from this time answerable for these debts; and that, should he neglect to discharge them immediately, he will be bound to pay all damages and interest accruing therefrom.

3. The next provision is, that said Gabriel promises and obligates himself, besides the payment of the said one thousand pounds, to board, lodge and clothe the said Jean Bte. Campau during his life.

4. Then Campau reserves to himself the right to live with Chene or any other person he may please; in the latter case, Chene shall be bound to pay his board, clothe him, and have him attended when sick; and as long as Campau lives with Chene, he is not to be obliged to work, and if he works, it will be of his own will and accord.

5. Chene next promises and obligates himself to keep at his house Archange Campau, to board and clothe her decently, until she has reached her majority; that is, eighteen years complete.

6. "And for the security of the payment of the said one thousand pounds, in the manner above mentioned, and for the fulfilling of the clauses and conditions here above expressed," Chene is prohibited from alienating, exchanging, or selling the farm or personal property without Campau's consent, and the whole is to remain and stand hypothecated till the payment in full of said one thousand pounds.

7. There is a further statement of their understanding that Chene is only to pay the debts of Campau then due, not exceeding the said sum of one thousand pounds: in paying debts he is to take receipts, which

are to be received in payment of the one thousand pounds, and when all is paid, Campau or his heirs are bound to appear at the office of the register of the county, "and release the present mortgage in a legal manner."

It is difficult to perceive upon what clause the complainant can rely as furnishing a condition or evidence that it was intended the deed should depend upon a condition either subsequent or precedent. All and each of these different clauses can only be construed as personal covenants; there is an entire absence of any words creating a condition. By the first clause, there is an express covenant that the grantee will pay the $2,500 in a particular manner. The grantor takes this covenant or personal obligation in lieu of money in hand. Chene, by the second clause, assumes to be answerable for the debts of Campau, and if he fails to pay immediately, he assumes to be answerable for all damages and interest accruing therefrom; and this is taken in lieu of a condition, upon breach of which the grantor might re-enter. Why should Chene assume the debts from the time of receiving the deed, and agree to pay damages and interest if he did not pay? and why are they agreed to be his debts, if his title was to depend upon his first paying the debts of Campau, in the manner and to the extent provided? It is not provided, that in the event of his failing to pay, he shall forfeit his title, or that the grantor might re-enter.

The third provision (for the support of Campau) is not stated to be any part of the consideration of the deed. It is a simple engagement or covenant of Chene to support Campau, &c., besides the payment of the money. The undertaking may have grown out of the same transaction, but the deed does not make it a condition.

All these promises and covenants are made by Chene; they are not imposed as the terms and as the language of the grantor. To make them operate as a condition, they must not depend upon another sentence; *and the words must be those of the grantor, and compulsory to enforce the grantee to do some act.* 2 Bac. Abr. 280; 15 Eng. C. L. Rep. 227; 2 Jacobs' Law Dic. 2; 2 Coke's Rep. 70; Sheppard's Touchstone, 119.

In the fourth provision, Campau reserves to himself the right to live with Chene, &c. In this there is no condition. The reservation is only of the privilege to live with Chene. It is no restriction to the estate: it is a covenant, a mere personal right. This sentence contains the nearest approach to a condition or qualification that is to be found in the deed. The manner he was to be at liberty to employ his time, shows the matter rested in covenant, and might be coerced in a court of law. The same may be said of the succeeding provision, by which Chene covenants to support Archange.

But let us apply the rules furnished by the books, and ascertain if they are such that, when applied to the construction of this deed, they will lead to a different conclusion. No precise technical words are necessary to make a condition. It is, however, necessary that it should appear from the face of the deed, to have been the intention of the grantor to create a condition, and whether the words amount to a condition, or a limitation, or a covenant, depends upon the construction of the contract. 4 Kent's Com. 132; 2 Caine's R. 352; Willes' R. 156.

The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract. 4 Kent's Com. 132.

The words usually employed in creating a condition, are, "upon condition;" and Lord Coke says this is the most appropriate expression, or the words may be "so that," "provided," "if it shall happen." Apt words of limitation are "while," "so long as," "until," "during," &c. 4 Kent's Com. 133, note a.

A condition, then, is a qualification, or restriction annexed to a conveyance of land, whereby it is provided, that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do, a particular act, an estate shall commence, be enlarged or defeated. 2 Cruise's Digt. 2.

In case of doubt, all intendments are made against the grantor, and a condition which destroys or defeats an estate or grant, is to be construed strictly against those for whose benefit it is intended. 4 Kent's Com. 125; 2 Bac. Abr. 286; 2 Cruise's Digt. 27; 29 Eng. C. L. Rep. 442; 1 Sumner 440; 17 Johnson's Rep. 66; 8 N. H. Rep. 477; 21 Eng. C. L. Rep. 398; 42 *id.* 693. And if it be doubtful whether a clause in a deed be a covenant or a condition, the court will incline against the latter construction. 4 Kent's Com. 127. To create a condition in a deed, a clause of re-entry, or a provision that the estate shall cease and be void, is required. 3 Com. Digt. 87, 88. Not so as to a lease, 4 Kent's Com. 123, if the estate is declared to be void upon non performance, or if in such case the lessor may re-enter. 8 Cowen 295; 1 Bac. Abr. 280, 281.

But words may amount to a condition when, without such construction, the party would have no remedy, but not when there are express covenants to which recourse may be had. 2 Bac. Abr. 287. Paying and yielding rent held not a condition. 2 Bac. Abr. 287, 290; 3 Com. Digt. 88; 4 Cruise's Digt. 375; Sheppard's Touchstone, 118, 119; 9 Eng. C. L. Rep. 296; 27 *id.* 129.

Applying these rules to these provisions, and they seem to make it more certain that they do not separately or collectively create a condition, but that they are covenants.

But the sixth provision, in my opinion, goes far to settle the proper construction to be put upon this deed. The very circumstance of setting forth the lien shows it was never intended to create a conditional estate, for if it was intended to be a conditional estate, the grantor would not have made such a provision; he would have provided a clause of re-entry; and it is to be remarked, that the lien has reference entirely to the consideration, and not to the support of Campau and his daughter. All the covenants are the language of the grantee, except one; and even if the last covenant be considered as the language of both parties, it shows that a mortgage only was intended by both parties, and in case of payment, Campau was bound to give a full receipt, and to release the lien in the register's office. This would not have been necessary, if payment and fulfilment was only required to perfect the deed. If the covenant against alienation could be considered a condition, it would be void. For a condition annexed to a conveyance in fee or devise, that the purchaser or devisee should not alien, is unlawful and void. 4 Kent's Com. 126.

In the case of Lessee of Foster *v.* Dennison, 9 Ohio R. 121, the court was required to construe an instrument by which the parties acknowledged payment of the consideration, and obliging the grantor to forever quit claim land; sealed, acknowledged, recorded, and possession released to the grantor, and held for thirty-five years; and the court held it to be a conveyance; that this was the manifest intent of the parties, and the law would endeavour so to interpret the proceedings of the parties as to work this effect.

The views we have expressed in regard to the covenants in the deed, are illustrated and fully supported by the case of Pownal *v.* Taylor, decided in the Virginia court of appeals, 10 Leigh's Rep. 179. The owner of a tract of land conveyed it to his nephew in fee, subject to the maintenance and support of the grantor and his sister. The deed contained a covenant by the grantee for such maintenance and support, and declared that the land was to be held therefor, into whose hands soever it might come. But the deed did not state that it was *upon condition* that such maintenance and support should be furnished, nor was there any clause providing for a re-entry by the grantor. Held, the provision for maintenance and support constituted merely a charge upon the estate, which might be enforced in equity—not a condition for breach of which the grantor could re-enter, as of his former legal estate. In that, as well as in this case, there was a provision for a third person, and it was held, that the third person (the sister) instantly acquired a beneficial interest, which she might have enforced by bill in equity. But if the provision was a condition then for the breach, the grantor might re-enter, defeat the estate, reinvest himself with his original title, and annihilate the vested interest which he had by his own solemn act conferred upon his sister. This cannot be, unless the grantor had expressly reserved the right to re-enter upon failure of the grantee to fulfil the purposes of the grant. These last remarks apply with full force to the provision for Archange in this deed. See 18 Pick. 248.

The mutual covenants in this case go only to a part of the consideration, and a breach of that part may be paid for in damages. In such case it has been held, they are to be regarded as independent. 7 John. R. 244; 1 Ohio 154; 10 Pick. 507; 3 Peters 346; 1 H. Black. 273; 5 Wendell 496;—particularly when they regard real estate, restrictions on which are odious in law. Sheppard's Touchstone 133.

We are therefore of the opinion upon the question of lapse of time, that complainants' bill cannot be sustained: and also, upon the question raised upon the deed, we are of the opinion that it is neither a deed of trust, nor a deed upon condition, but that it is an absolute deed, incorporating in it a lien, in the nature of a mortgage, to the grantor for the consideration money, &c.

Let it be so certified to the circuit court for Wayne county.

Certified accordingly.

Campau v. Gillett.

A license was granted to an administratrix to sell real estate for the payment of debts, under an act of the late territory of Michigan, entitled an act directing the settlement of the estates' of persons deceased, and for the conveyance of real estate in certain cases, adopted 27th July, 1818. The license was granted on the 12th January, 1827, but the sale did not take place until the 7th July, 1831. The sale was held to be void, as more than four years had elapsed between the ganting of the license and the sale—the statute of limitations then in force, barring all claims against the estate after four years.

Where a license was granted by a county court to an administratrix to sell real estate, and after the granting of the license and before the sale, the law giving the court jurisdiction was repealed, the sale was held to be void—the repeal of the law being a revocation of the license.

Case reserved from Wayne Circuit Court. Ejectment by Henry Campau, son and heir at law of Henry Campau, deceased. The defence was a deed of the premises in controversy, dated 8th August, 1831, from the administratrix on the estate of Campau, deceased, to Peter J. Desnoyer, whose title the defendant held. Campau died in 1822, and his widow took out letters of administration on his estate the same year, or the year following, and, on the 12th January, 1827, the county court of Wayne county, on her application, licensed her, as administratrix on the estate, to sell the premises in question. On the 8th July, 1831, having been regularly advertised, they were sold at public auction, and purchased by Desnoyer, to whom they were conveyed by the administratrix. The act giving the county court jurisdiction to grant licenses in such cases, entitled "An act directing the settlement of the estates of persons deceased, and for the conveyance of real estate in certain cases," adopted 27th July, 1818, was repealed in 1829, previous to the sale. Ses. L. 1829, p. 86.

Davidson, for plaintiff.

Backus, for defendant.

By the court, WING, J. It is objected that the statute of limitations barred any claim which might have existed against the estate of the deceased, and therefore there could be no legal sale.

The order of sale bears date the 12th day of January, 1827. The day of sale was the 7th July, 1831. Four years and six months, less five days, elapsed from the date of the order to the day of sale. Only thirty days' advertisement of sale was required, and probably a longer notice was not given; if so, more than four years had elapsed from the date of the order to the time of giving notice.

By the law in force from the time the order was granted to the time of sale, the time limited to bring an action against an executor or administrator was four years: after that period the suit was barred. Laws of 1820, p. 60, sec. 3. Our probate and limitation laws were adopted from those of Massachusetts, and with them, according to a familiar rule, we adopted the construction put upon those laws by the courts of that state.

In the case of Wellman *v.* Lawrence, 15 Mass. 310, an administrator presented to the court of probate a list of debts, including his own, on the 10th January, 1804, and he was duly licensed by the court of common pleas, March term, 1804, to sell so much of the real estate of his intestate as should be sufficient to pay his just debts. A sale was advertised, but on the day of sale, the land, being offered, was not sold, and the auction was closed without adjournment. On the 16th August, 1816, the administrator sold at public auction, after due notice, &c. The administrator never paid any of the debts due from the estate, and he had never been sued, and all the debts against the estate were on simple contract.

The court held the administrator had no authority to make the sale under the license at the time he sold. At the time of his obtaining the license, there were claims against the estate, but at the time he made the sale, no such demands existed. The court say, "As suits against them (administrators) are by statute to be commenced within four years, there can be no reason for the exercise of the authority given to the courts for licensing the sale of real estate for the payment of debts, after that term has expired." And again: "We should not then have licensed this administrator, at the time he made the sale, and there is no ground on which the sale can be justified, which would not have rendered it equally fitting to have granted a license at that time." See also 15 Mass. 58; 16 *id.* 172; 13 *id.* 164, 165; 2 Pickering, 2d ed. 509, n. 2.

In the case of Heath *v.* Wells, 5 Pick. 140, it was held, "A license granted to an administrator to sell real estate of the deceased, to pay a debt barred by the statute of limitations respecting executors and administrators, is void." In this case the court remark, upon the conclusive effect of a license—the court having jurisdiction—and say: "The court granting license to the administrator had no jurisdiction of the subject matter; for if the administrator had no right to sell, the estate not being assets in his hands, the court had no cognizance of the case, and the license was merely void. It was not a case for deliberation or decision. The license could give no authority to the administrator, who might as well have been licensed to sell lands of a stranger. To make an administrator's sale valid, the right of the administrator to sell, and the license of the court, must coincide."

In 8 Greenleaf, 220, the court held that "a license to sell real estate, for the payment of debts, would not be granted where the claims appear to be barred by the statute of limitations."

In this case, and in the cases in Massachusetts, referred to above, and the authorities therein referred to, the decisions appear to be put upon the ground that administrators have no power over the lands of the intestate, except there shall be a deficiency of personal property belonging to the deceased. At common law, the real estate descends to the heir of the deceased; and without the happening of that contingency, the right of the administrator to ask for a license, or of the court to grant it, did not exist. The statute of limitations was intended for the benefit of the heirs, that they might be quieted by a speedy settlement of estates in which they should be interested. From the authorities cited, and the reasons given, we think the sale by the administrator in the case before us was void.

It is also insisted, that the order of the county court had spent its force before the day of actual sale, for the reason that the law under which it was granted, had been repealed, and all power in such matters was vested in judges of probate.

The law of 1820, from which the county court derived their power to grant the order, was unconditionally repealed by the law of 1829, Acts of Legis. Coun. 1829, p. 86, the first section of which declares, "That the county courts of the respective counties in this territory lying east of Lake Michigan, shall not, hereafter, have jurisdiction of any civil matter in law or equity." Jurisdiction in probate matters, and the power to grant license to sell real estate to pay the debts of intestates were by a law of the same year, given to the judges of probate in the respective counties.

To this objection it is answered, that the powers of the county court were spent when they had granted the order, and it was remitted to the probate court to be acted upon; that the repealing law does not affect any act done; that the county court was not annihilated, its criminal jurisdiction remained; and that under the law of 1820, the action of the administrator upon the order was not to be reported to the county court, but to the court of probate; that the order was in effect a judgment, a final proceeding in the county court.

So far as the interests of purchasers are concerned, the courts of Ohio and this state have ever considered these orders of equal validity with judgments. If the court have jurisdiction of the matter, it has been held the purchaser need not look behind the order. 3 Ohio R. 257, 561-2; 4 *id.* 130, 171.

The law authorizes a sale, but, on a proper application, the court is to determine whether the facts submitted will, under the law, justify their making an order of sale. Without such order, the sale would be void. The order is the foundation of the power to sell. But without a law authorizing the sale, the order itself would be void. It would lay no foundation that would justify the execution of such power. Every order of court, to some extent, may be considered as a judgment; but it must have the character of a final judgment, or the consequences contended for by the defendant would not follow. By a final judgment, conflicting rights between parties are settled, and are made certain; and a party is entitled to receive that which he has recovered by a judgment, and this right cannot be taken away. By the order the administrator gains no personal rights, neither does he or the creditors lose any rights they gain by the order; the administrator is at liberty to sell, but whether he sells or not, does not concern him—he is only bound to the extent of the personal estate; and as to the creditor, he may enforce his claim by the agency of the administrator, or by a suit at law; no right is settled by the order;—then how can the order have the effect of a judgment? Under certain circumstances, the administrator has by the law the right to sell: but the power to say when these circumstances have arisen, is vested in the court, and it is only with the approbation of the court that this power—entrusted to him, not by the order of the court, but by the law under which he acts—can be exercised.

The order of sale, say the court in the case of Ludlow's Heirs v. Wade. 4 and 5 Ohio R. 503, is nothing more than record evidence of the existence of the necessary facts to justify such a proceeding, and the assent on the part of the court that the administrator should exercise a power previously vested in him. It calls that power, which was before dormant, into life and activity. It follows, then, that a repeal of the law is a revocation of the power; and, after its revocation, a sale made would be void: although during the existence of the statute, an order for such sale had been made. In fact, the right to sell depends both upon the existence of the law and of the order, and when either ceases to be in force, the right is gone. A repeal of the law would have an effect to rescind the order, equivalent to the effect which the reversal of a judgment would have upon that judgment; and, as after such reversal a sale would convey nothing, so after the repeal of the law would a sale made be void: while the law and the order are in force, a good title can be made; but not after one is repealed or the other rescinded.

In the case of the Bank of Hamilton v. Dudley's Lessees, 2 Peters 523, the question decided in 4 and 5 Ohio R., above cited, was considered. The court say, "this is a point on which we cannot doubt. The power to sell is not an independent power, to be exercised at discretion, when the exigency, in the opinion of the administrator, may require it; but is conferred by the court in a state of things prescribed by the law. The order of the court is a pre-requisite, indispensible to the very existence of the power; and if the law which authorized the court to make the order be repealed, the power to sell can never come into existence. The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor, must always depend on the wisdom of the legislature."

The cases of Davis' Lessee v. Livingston, 6 Ohio R. 225, and Paine's Lessee v. Skinner, 8 Ohio R. 162, maintain the same views. And so in 16 Ohio R. 573, Lessee of Perry v. Clarkson and others. The court, whilst they express their regret that administrators and purchasers should have acted upon a misapprehension of the law, and that mischiefs have resulted from such mistakes, say, they conceive that the court has put a right construction upon the statutes, and that it was not in their judicial power to remedy the evil. See 1 Hill 332; 10 Watts' R. 351.

It will be perceived that these decisions cover the point made in this case; and it is not perceived that it could make any difference whether the power to grant the license to sell was wholly annihilated or transferred to another court, as in either case the order could derive no force from the court that granted it; and the decisions cited do not attach any importance to the consideration that administrators were or were not required to report their proceedings to the court granting the order. We therefore think the sale was void for this reason also.

Certified accordingly.

Paddack v. Pardee.

In giving a construction to an instrument, the whole of it must be examined, and every part of it be taken into consideration; and the situation of the parties and the subject matter of the transaction may also be taken into consideration.

A deed described the premises conveyed as a certain piece or parcel of land situate in out lot No. 10, in the village of Pontiac, to comprise lots Nos. 1 and 9, on the west part of the subdivision of the aforesaid lot No. 10, the same being 112 feet wide on the Mt. Clemens road to the centre of the road leading to the woolen factory, and extending in length to the centre of the Clinton river, with the privilege of fifty square inches of water, to be applied five feet from the surface of the Clinton river, opposite the place of taking the water from the race—to be subject at all times and forever to the woolen factory, and one run of stones for

flouring, after such mill shall be erected—the dam and race to be forever put in repair by said party of the first part—the said two lots being a strip of land off from the south westerly side of said out lot No. 10, and being designated on a plat of the subdivision of said out lot, this day recorded. It was held,

1. **That the plat of the subdivision of lot No. 10 might be referred to for the purpose of giving a construction to the grant.**
2. **It appearing from the plat that lots 1 and 9 were separated by a strip of land marked "race and alley," and that lot No. 1 lay northerly of it, and between it and the Mt. Clemens road, and lot No. 9 lay southerly of it, and between it and the Clinton river, it was held that the fee in said strip of land did not pass by the deed.**
3. **That the grantee could not draw the water through an orifice of fifty square inches into a flume or reservoir upon his own premises, and then apply it by a larger discharge than fifty square inches; thereby enabling him, a portion of every twenty four hours, to drive machinery requiring more than fifty square inches of water to propel it.**

Appeal from Oakland Circuit Court in Chancery.

Paddack filed a bill in the circuit court against Pardee, to settle a question of right in regard to a water power, and to quiet his title to certain premises connected with it. A decree having been made in his favor, Pardee appealed to this court. The case is fully stated in the opinion of the court.

Wisner, for the appellee.

C. Draper, for the appellant.

By the court, Miles, J. The complainant being, as he alleges, seized in fee and possessed of a valuable water power, with a dam and race, on the Clinton river, on the N. W. and S. W. quarters of section 28, in town 3 north of range 10 east, and upon which he now has a woolen factory and a grist mill, on the 17th day of February, 1836, executed a conveyance by deed to the grantors of the defendant of a portion of the premises, under the following description: "A certain piece or parcel of land situate in out lot number ten, in the village of Pontiac, being a part of the north-west quarter of section No. 28, town 3 north of range 10 east, viz: to comprise the *lots* Nos. 1 and 9, on the west part of the subdivision of the aforesaid lot No. 10, the same being one hundred and twelve feet wide on the Mt. Clemens road to the centre of the road leading to the woolen factory, and extending in length to the centre of the Clinton river; with the privilege of fifty square inches of water, to be applied five feet from the surface of the Clinton river, opposite the place of taking the water from the race, to be subject at all times and forever to the woolen factory and one run of stone for flouring, after such mill shall be erected; the dam and race to be forever put in repair by said party of the first part; the said two *lots* being a strip of land off from the south-westerly side of said out lot No. 10, and being designated on a plat of the subdivision of said out lot this day recorded."

It is alleged in the bill that the race is the property of the complainant, and was not conveyed by him.

The bill states, that the defendant has made a large excavation on the side of the race and within two feet of the water: that he claims that he has a right to construct a reservoir of such dimensions as he pleases, leading out of the race, without any regard to the restrictions contained in the deed: whereas, the complainant insists that it was the intention of the parties, as plainly expressed in the deed, that the orifice at the race where the water is to be diverted is to be fifty square inches in dimensions, and no more.

The bill further states, that the present excavation is sufficiently large to pass at least *twenty feet of water*, and to divert the whole body of water from the race, and to render the water power entirely useless to the complainant.

The bill prays, that the defendant may be compelled to take the water from the race, if at all, in the manner prescribed by the deed, and to release all claim to the race, except the right of so taking and using the water.

The defendant, in his answer, admits making the excavation, but denies any intention to construct a reservoir, as charged in the bill. He denies that he intends to draw the water from the race through an orifice exceeding fifty square inches; but claims that he has the right of having the water which shall escape through such orifice, flow into a flume of such dimensions and form, and upon his own premises, as *he shall choose;* and that he has the right of applying the water which may so escape to the propelling of machinery to be erected at any distance he may choose from said orifice, or to apply the same immediately at such opening. He denies that the complainant is the owner of the race, but, on the contrary, claims to own the soil over which the water flows, and the banks and bed of the same, along by and upon the premises owned by him.

A replication was filed, the cause was heard upon pleadings and proofs, and a decree made, that, by the conveyance, defendant was entitled to fifty square inches of water, and no more, by an orifice or race of such dimensions as to admit that quantity, and no more, from the race to the place where it should be applied, subject to the restrictions and limitations in the conveyance named, and that the title to the race was in the complainant.

We are asked to reverse this decree as to the water privilege, because, as is insisted, the defendant is not, by the terms of the conveyance, restricted to carrying the water from the race to the place where it is to be used, in a race of the same dimensions as the orifice at which it is taken, and that he has a right to take the body of water into a flume of larger size, *and then to take it out of such flume as he shall choose.*

Secondly, it is urged that the race is not shown to be the property of the complainant.

The question made by these pleadings, then, is, whether the defendant is entitled to control the use and application of the water after it leaves the race, or whether, by the terms of the grant, he is limited and restricted in such use.

In giving a construction to this instrument for the purpose of ascertaining the intention of the parties, the whole instrument must be examined, and every part taken into consideration. Howell *v.* Richards, 11 East. 643.

In determining the meaning of any particular sentence or provision, we may also take into consideration the situation of the parties, and the subject matter of their transactions, to which the contract relates. Wilson *v.* Troup, 2 Cowen 223. See also Strong *v.* Benedict, 5 Conn. R. 220, and the cases there referred to, to sustain the proposition of Hosmer, Ch. J., that the condition and situation of the parties, and other collateral facts known to them both, may properly be recurred to, to ascertain their mutual intention. In the case of the King *v.* Laindon, 8 T. R. 379, evidence was received to ascertain an independent fact, in order to aid in the construction of an agreement. Also Sumner *v.* Williams, 8 Mason 214.

I propose, then, to apply these principles, and such others as may be drawn from a few adjudged cases, in attempting a construction of the deed before us.

First, it is well to notice, that the complainant reserved what is called the first right of water, for the woolen factory, and for one run of stones when he should erect a grain mill.

The grant to the defendant is restricted to a certain quantity of water, when there shall be so much over and above what is needed by the complainant for the woolen factory, and also for the mill after it shall have been erected. The complainant's right, in this respect, is ever to remain superior to that of the defendant.

In Sumner *et al.* *v.* Foster, 7 Pick. 32, it was held that the owner of a mill, who is entitled to use only the surplus water not required by another mill, is bound to shut his gate when there is not a sufficiency of water for both. In that case, the grant was of water "sufficient for any work except a grist mill or saw mill," to be taken from the flume of the grantor, to be made for the use of a cotton factory, and when there was more water than was sufficient for the cotton factory.

We will next consider whether the complainant is shown to possess the title to the land over which the race is carried, as the result of this inquiry must necessarily influence, to some extent, the construction to be given to the grant of the water.

It is insisted, that the description in the deed of the land conveyed, includes that portion over which the race is carried: and that this description must be confined to the deed, without reference to the plat in evidence.

The objection to referring to the plat was grounded mainly upon an alleged want of evidence of identity. The paper given in evidence purports to be a transcript from the records in the office of the register of deeds; and to be a subdivision of out lot No. 10, by a surveyor into several lots, among which are lots Nos. 1 and 9, the boundaries to which upon the Mt. Clemens road on the north, on the road leading to the woolen factory on the west, and on the Clinton river on the south, correspond with the description in the deed.

By this plat, it appears that the race runs across a part of the width of out lot No. 10, in a north-easterly direction, and parallel, or nearly so, to the river. This piece of ground is laid down as a race and alley, being one chain in width, and bounds the south line of lot No. 1, and the north line of lot No. 9, in the subdivision. But it was insisted, on the argument, that the race, or the ground covered by it, is clearly included in the descriptive words in the deed: that lots 1 and 9 extend from the Mt. Clemens road to the centre of the Clinton river. By this, I understand that such is their extreme bounds in those directions. It will be observed, that although the width is given, the length is not: and the reference to the plat shows why this was omitted in speaking of the extreme length of both lots. As there are two lots, there must be a boundary between them somewhere, if only by a line drawn: the plat shows that boundary to be the land left for the race and alley.

There is, besides, the testimony of two witnesses, who are acquainted with the whole lot and its subdivisions, and who together establish the south line of lot No. 1 to be north of, and the north line of lot No. 9 to be south of, the place where the defendant has put in his flume to take the water from the race.

That it is competent to refer to the plat to render certain the description in the deed, is beyond question. "Where the act of disposal relates to another thing, that thing becomes in a manner part of the disposition, and the standard referred to being certain, the grant by relation thereto becomes certain according to the common maxim, *id certum est, quod certum reddi potest.*" 4 Bac. Abr. 524.

The whole of this description taken together, then, shows that lots 1 and 9 consisted of two distinct parcels of land, with the strip of land one chain wide, over which the race passes, lying between them: so that the defendant has by the conveyance acquired no title to the land on which the race is.

The testimony of the witnesses before referred to shows that the excavation in the side of the race is made upon the land of the complainant: that the water must be conducted across his land before it reaches the bounds of lot No. 9, upon which, by the terms of the grant, it must be used.

The complainant, then, granted to the defendant a subordinate right in the use of a portion of the water running in the race, on his own premises. This would necessarily include a right to the defendant to carry the water across that portion of the complainant's land between the south bank of the race and the north bounds of lot No. 9.

With this preliminary examination we shall be the better enabled to understand the meaning of the language used in the grant itself. It is of fifty square inches of water, "to be applied five feet from the surface of Clinton river, opposite the place of taking it from the race."

The plain sense of these words would seem to be, that the quantity *taken* is that to be *applied*, and that, although the defendant would have a right to apply it at a distance from or as near to the aperture as the approach of his own premises would allow, still the quantity applied must be the same.

If the grant had been of a given quantity of water, without any words of limitation as to its use or application, the defendant might have some better reason for the claim which he makes; but the quantity taken is to be applied at a particular place: and although the exact spot is not designated, yet it must necessarily be at some point on lot No. 9, between the race and the river, and opposite the place where it is taken.

If this construction is correct, it excludes the idea of drawing the water into a flume or reservoir upon the premises of the defendant, and afterwards applying it by a *larger discharge* than fifty square inches, and thus, perhaps, enabling the defendant, during a portion of every twenty-four hours, to propel machinery of a larger or different character from that which he could move by a direct application of the water.

Some consideration is also due to the fact that the complainant had already some machinery in operation on this race, and contemplated the erection of other mills. This would induce him, as I believe he has, to restrict the defendant to a direct application of the water granted, and at some place upon the lands conveyed in the deed. The defendant purchased with a full knowledge of these circumstances.

On the whole, then, from the conveyance, the relation of the parties, and the nature of the transaction, I think we may safely conclude that it was well understood by the parties, and so expressed in the deed, that the defendant was to have the right to take and use fifty square inches of water, to be applied directly to his machinery by a trunk or race conducting the same from the complainant's race to the place where the same should be so applied, and not otherwise.

Another objection to the decree, is, that the complainant has averred in his bill that he is seized in fee of the whole premises on which his water power is situated, and that he has not proved this fact. This was unnecessary: the title to any portion of the premises except the race, is not in question. The defendant makes no claim of title to any portion except that; and strangely enough, although he says in his answer that he does not know whether the complainant was or was not seized of the premises when he executed the deed, yet he claims title to the race by virtue of the same conveyance which he disputes in his answer. The title to the land under the race, if at all conveyed to the defendant, is in the same deed, and included in the same description, with that of the two lots 1 and 9. In fact, the defendant insists that description includes the race.

It is idle, then, for the defendant to deny a title under which he himself claims.

In this view of the whole case, the decree must be affirmed.

Decree affirmed.

HIGGINS ET AL *v.* WATSON ET AL.

R made his promissory note for $100, payable in six months, to O, or bearer, on the back of which was the following endorsement: "I guaranty," signed by W. It was held,

1. As there was no date to the endorsement, that, in the absence of all proof, the making of the note by R, and the endorsement by W, must be presumed to have been contemporaneous acts, and one entire transaction.
2. That R and W were joint and several promissors or makers of the note.

What is sufficient prima facie evidence of the loss of a promissory note, under R. S. ch. 102, sec. 88, p. 460, to admit parol evidence of its contents.

The bond to be executed by plaintiff to defendant, under R. S. ch. 102, sec. 89, upon bringing an action on a lost promissory note, should run to all of the defendants, although some of them have not been served with process.

ERROR to Wayne Circuit Court. The plaintiffs brought an action of assumpsit, in Wayne county court, against the defendants, on a promissory note, of which the following is a copy:

$100. DETROIT, April 11, 1846.

Six months after date, I promise to pay Placidus Ord or bearer one hundred dollars, at James M. Lyell's office, value received.

ANDREW T. MCREYNOLDS.

On the back of the note was the following endorsement: "I guaranty, John Watson." Process was served on Watson, but not on McReynolds. On the trial in the county court, evidence was given of the loss of the note, and of its contents, and a bond of indemnity was executed by plaintiffs to defendants, in pursuance of the statute. The county court rendered judgment for the plaintiffs, and thereupon Watson sued out a writ of certiorari to the circuit court, which reversed the judgment of the county court. To reverse this last judgment, the plaintiffs brought their writ of error.

Wells and Cook, for plaintiffs, in error.

O'Flynn, for defendants, in error.

By the court, GREEN, J. The important question in this cause, and the only one affecting the merits is, whether the defendant Watson is a joint promissor with McReynolds.

In order to determine this question, the first inquiry is, *when* was the endorsement made by Watson? The only testimony bearing on this point, is that of Peterson. He says that he received the note from Peterson and Humphreys, in the city of New York, on or about the eighth day of May, 1846, in behalf of the plaintiffs, and that the endorsement was then upon it. The guarantor is a third person, not named as a party on the face of the note, and he affixes no date to his guaranty.

In the case of Leonard *v.* Vredenburgh, 8 John. R. 29, it was holden that the writing imported, upon the face of it, one original and entire transaction; for, says Kent, Ch. J., in delivering the opinion of the court in that case, "a guaranty of a contract implies, *ex vi termini*, that it was a concurrent act, and part of the original agreement." In that case, the note was made by one Johnson to the plaintiff, bearing date Nov. 9, 1808, at the bottom of which was the following, without date, viz: "I guaranty the above, J. Vredenburgh."

If the opinion of the court in that case, upon the point under consideration, is good law, and I do not find that it has ever been questioned, then, in the absence of all proof, the making of the note by McReynolds, and the endorsement on the back of it by Watson, must be presumed to have been cotemporaneous acts, and one original and entire transaction.

But it is argued, that in the absence of any proof on the subject, there can be no presumption that the endorsement was made at the time of making the note, because it may have passed through Watson's hands as a subsequent holder, and been guarantied by him upon his transferring it to Peterson and Humphreys, or some one else.

To this argument, it seems to me, there are two answers. First, the endorsement having no separate date affixed to it, in the absence of any proof on the subject, its date must be referred to that appearing on the face of the note; and, second, that if Watson made the endorsement at a subsequent period, that fact is peculiarly within his knowledge, and cannot be supposed to be within the knowledge of the plaintiffs, and the burthen of proof, therefore, rests upon Watson.

In Hunt *v.* Adams, 5 Mass. 358, the guaranty was written at the bottom of the note, without a separate date, and there does not appear to have been any proof showing when it was made. Ashman, of counsel for the defendant, in his argument remarks, that "for aught that appears, this undertaking of the defendants was made on a different day;" yet Ch. J. Parsons, in delivering the opinion of the court, assumes that the signatures to the note and the guaranty were made at the same time.

Regarding the making of the note and the endorsement thereof by Watson, as one transaction, all the American authorities seem to agree, that the consideration expressed or imported on the face of the note is sufficient to support the undertaking of the guarantor, under the statute of frauds.

The rule which governs the construction of all other contracts, that the intention of the parties must control, applies with full force to contracts of this character. In most of the cases in which the endorsement of a note has been held to make the endorser a guarantor, and consequently an original promissor, the notes were not negotiable, and the party endorsing could not therefore be treated as an ordinary endorser. The only mode by which effect could be given to such an endorsement, was to treat it as an absolute guaranty of payment. Seabury *v.* Hungerford, 2 Hill 84; Dean *v.* Hall, 17 Wendell 214.

In this case, if Watson is liable at all upon his endorsement, he is liable absolutely as a guarantor, either jointly with McReynolds, as an original promissor, or alone. He cannot be treated as an ordinary endorser, for his language is, "I guaranty," which imports an absolute, unconditional undertaking that the note shall be paid at maturity; and this is precisely the undertaking of McReynolds, the admitted maker, and neither more nor less. They are, in effect, perfectly identical.

The case of Hough *v.* Gray, 19 Wendell 202, is in effect precisely like this. Moon made his note payable to Cameron or bearer, and Hough at the same time made and signed the following endorsement on the back of it, viz: "This may certify that I guaranty the payment of the within note." The court held that he was liable as maker, severally, to Gray, who had purchased the paper of Cameron. Cowen, Justice, in delivering the opinion of the court, says: "The court below were clearly right, therefore, in holding that he made himself a joint and several promissor with the admitted maker." See Story on Promissory notes, ch. 10, title "Guaranty of Promissory Notes," and the notes to the text, in which the leading cases on this question are collected.

Watson and McReynolds being, in legal effect, joint and several makers of the note, were properly joined in the action, and a judgment in form against both is therefore regular, though Watson only was served with process. R. S. ch. 107, sec. 1. For this reason the bond of indemnity was properly executed by the plaintiffs to both the defendants. Mc Reynolds, though not served with process, has an interest in the indemnity, because an execution issued upon a judgment against both defendants may be collected of the personal property owned by him as a partner with Watson.

The only remaining question is, whether the loss of the note declared on, was sufficiently proved to authorize the introduction of secondary evidence of its contents; and I think the circumstances related by the witness Peterson sufficient *prima facie* evidence of the loss. He states positively the disappearance of the pocket book containing the note, and that diligent search was made for it, without success; and that he had the entire care of the notes belonging to the plaintiffs.

This being a preliminary inquiry, and the testimony being given to the court, and not to the jury, I see no objection to the statement made by the witness, of the fact that a certain individual was prosecuted criminally for stealing the note, and that he confessed his guilt, and stated what he had done with it.

The judgment of the circuit court must be reversed, with costs to the plaintiffs in error, and the cause remanded to the circuit court for the county of Wayne, for further proceedings.

Judgment reversed, &c.

BOWEN AND MCNAMEE *v.* MEAD AND MEAD.

One Cram was indebted to the plaintiffs, who instructed their agent to call on him for payment or security. The plaintiffs' agent called on Cram, and he not having the money to pay the plaintiffs, made a joint and several promissory note for $408, payable forty days after date, to the plaintiffs or bearer, signed his own name thereto, and the copartnership names of W. W. Cram & Co. and Wilcox & Co., of which firms he was a member, and he and the plaintiffs' agent then went to the defendants, S. P. and W. W. Mead & Co., who signed the name of their firm to the note at the request of Cram, when the note was delivered by Cram to the plaintiffs' agent. Neither S. P. and W. W. Mead & Co. nor the plaintiffs' agent were informed or knew that Cram had signed the names of W. W. Cram & Co. and Wilcox & Co., without authority from his copartners, which was the fact. *Held*, the defendants were liable to plaintiffs on their promise.

CASE reserved from Wayne Circuit Court. One Jessee Cram was indebted to plaintiffs, who sent their clerk to Cram's store to collect or secure the debt. The clerk called at Cram's place of business, and urged him for payment or security. Cram could not pay, but offered to give his note with sureties for the amount, payable in forty days, which the plaintiffs' clerk agreed to accept. Cram stepped out and wrote a joint and several note, payable to the plaintiffs or bearer, in forty days, for $408, the amount due to them, signed his own name to it and the copartnership names of W. W. Cram & Co. and Wilcox & Co., and with it so signed, he and the plaintiffs' clerk went to the place of business of the defendants, S. P. & W. W. Mead & Co., who, at the request of Cram, signed the name of their firm, when the note was delivered by Cram to the plaintiffs' clerk. Cram was a partner of the firms of W. W. Cram & Co. and Wilcox & Co., and signed their names to the note without authority from his copartners; but of this neither S. P. & W. W. Mead & Co. nor the plaintiffs' clerk had any notice at the time the note was signed by S. P. & W. W. Mead & Co., and delivered by Cram to the plaintiffs' agent.

Lothrop and Duffield, for the plaintiffs.

Joy and Porter, for the defendants.

By the court, WHIPPLE, C. J. Before proceeding to consider the objections urged by the defendants against the right of the plaintiffs to recover, it may be well to state the legal relations existing between the plaintiffs and defendants, the defendants and Cram, and the defendants and the other parties whose names appear upon the note, at the time the same was delivered to the plaintiffs. In respect to the payees (the plaintiffs), the law regards the defendants as occupying the relation of joint and several promissors; as between the defendants and Cram, the former stood in the light of sureties of the latter; and the legal relation of Cram & Co., Wilcox & Co., and Mead & Co. to each other, was that of co-sureties of Cram, for whose individual debt the note was given.

The plaintiffs, then, might, under the facts in the case, well consider all and each of the parties who signed the note as mere sureties, as bound to them in the same manner and to the same extent as Cram, the principal debtor. Their undertaking upon the face of the note was not collateral, but absolute—it was an unconditional promise to pay the note according to its tenor.

The legal rights of the parties would not be changed, if, instead of executing one note, the makers had executed four several notes, each binding himself to pay to the plaintiffs the sum specified in the note upon which this suit is brought. The right of the plaintiffs to sue one or all of the parties upon their several liabilities, would not have been more complete than is their right to sue each separately upon the note in question. If several judgments were recovered, the satisfaction of one would operate as a satisfaction of all; and there would spring up new rights, as between the surety who satisfied the judgment and his principal, and between such surety and his co-sureties. The obligation on the part of the principal would be to indemnify the surety to the full extent of the loss he may have sustained; and the obligation on the part of the co-sureties would be to contribute their just proportion towards making up such loss.

These general remarks would equally apply, had the sureties of Cram thought proper, when they executed the note, to have severally added to their signatures the word "surety." While such addition would have indicated on the face of the note that they stood in the relation of sureties to Cram, it would not have changed the legal nature of their liability to the payees—the law would still consider them each as principals. Having placed themselves in the situation of principals, by expressly declaring upon their contract that they bind themselves as such, they must necessarily be held to the character they have thus voluntrily assumed. That character they have no right to disclaim, and there is no hardship in holding them to it.

But the principal ground of defense, is, that the plaintiffs are seeking to enforce an obligation the defendants never entered into: that at the time they executed the note, they supposed that the responsibility they were incurring would be shared by others. But the nature and extent of the defendants' liability must be determined by what appears on the face of the note, and not by any erroneous opinion they may have formed at the time of its execution. Does the circumstance, then, that Cram & Co. and Wilcox & Co. have successfully resisted the enforcement of the contract as against them, release the defendants from its obligation? I am unable to perceive how such a conclusion can result from such premises. That the defendants may not be able to enforce contributions as against persons who with them stood in the relation of sureties for Cram, is no reason for annulling the contract into which they entered with the plaintiffs.

The right of the plaintiffs to recover upon their *express* promise, is not dependent upon the right of the defendants to recover against their co-sureties upon the *implied* promise, that they would share equally any loss that might accrue in consequence of their joint and several undertaking as sureties of Cram. If the converse of this proposition were true, it would convert a liability, which by the terms of the contract is absolute, into a contingent or conditional liability. That the liability of the defendants was absolute, I have already shown: they promised to pay to the plaintiffs $408, forty days after the date of the note—*not* that they would pay that sum *in the event* that Cram & Co. and Wilcox & Co. were also liable. The written agreement imports no such conditional promise; and the law annexes no such condition under the facts disclosed in this case.

It is further insisted, that the agent of the plaintiffs took the note, chargeable with notice, that a fraud had been practiced upon the defendants. If the facts warranted the presumption that the plaintiffs were seeking to reap the fruits of their own dishonesty, through the aid of this court, the case would be a clear one for the defendants. But I am unable to discover any ground upon which such a charge can rest. The agent of the plaintiffs knew that the note was given for the individual debt of Cram; it is also quite probable that he discovered, when the note was *delivered* to him, that the names of the two firms of Cram and Co. and Wilcox and Co. had been placed there by Jesse Cram.

What passed between Cram and Mead and Co., when the latter were solicited to execute the note, does not appear. Enough, however, appears on the face of the instrument to have admonished Mead and Co. that the note was probably given for the individual debt of Jesse Cram. If not, why should his signature appear, binding himself individually, and as a member of both firms?

If the note had been given for a debt of either firm, Jesse Cram would have been as effectually bound, by adding the signatures of these firms, as by affixing his own signature. Again: when the note was presented to Mead and Co. for their signature, the names of the other makers were affixed to it; and they had the same opportunity of knowing that each of those signatures were in the hand writing of Jesse Cram, as had the agent of the plaintiffs. The means of information upon both the facts just adverted to, were as accessible to Mead and Co. as to the plaintiffs. The former were as much interested to inquire into the authority of Cram to execute the note in the name of the firms of which he was a member, as were the plaintiffs. If the authority did not exist, then Mead and Co. could not, as against these firms, enforce contribution; and the plaintiffs, for a like reason, would lose the benefit of the security which they supposed they had obtained.

This circumstance would, in the absence of other proof to the contrary, repel the presumption that any fraud was meditated by the plaintiffs. They are no more responsible to Mead and Co. for any excess of authority on the part of Jesse Cram, than they would be for the solvency of their co-sureties, had there been no excess of authority, and their liability to contribute had been established by a judgment at law.

It was the duty of Mead and Co., before giving credit and character to a note which was to pass into the hands of a third party, to ascertain, if they desired so to do, whether Jesse Cram had exceeded his powers as a member of the firms of Cram and Co. and Wilcox and Co. Not having done so, they cannot now, in law or justice, be permitted to shield themselves from a responsibility voluntarily incurred, by insisting that a fact, of which they had no knowledge, should have been communicated by the plaintiffs, who, for aught that appears, never saw the note until its execution by the defendants. The wrong, whether intentional or not, growing out of the illegal act of Jesse Cram, ought not to be visited upon the plaintiffs, to whom no fraud or other misconduct in the transaction can be fairly imputed.

We have been referred to Leaf *et al.* *v.* Gibbs, 19 Eng. C. L. Rep. 475, as an authority to show, that, under the facts in this case, the plaintiffs are not entitled to recover. I have examined that case, and am unable to trace any analogy between it and the one before us. It is there held, that if a person signs a promissory note, on a representation that others are to join, and one afterwards refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless such person, knowing the facts, and being aware of his rights, had consented to waive his objections.

The distinction between the two cases may be gathered from the charge of Ch. Justice Tindal to the jury. He said, that "from the evidence of the plaintiffs' witnesses, that the defendant was told that his mother was to join, and therefore the obtaining of her signature was a condition, which, if not carried into execution, would justify the defendant in withdrawing." Until the signature of the mother was obtained to the note, there was in law no delivery, and the attempt to enforce its payment was a fraud upon the defendant, who was told that his responsibility was to be shared by another.

In the case of Duncan *v.* The United States, 7 Peters 435, the fact was, that a bond was drawn in the names of Abner L. Duncan, John Carson, and Thomas Duncan, as sureties for William Carson, but Thomas Duncan never signed it.

In behalf of the plaintiff in error it was contended, that the body of the bond proved that Thomas Duncan was, by the contract, to share its responsibility with Abner Duncan, and without the signature of Thomas Duncan it was never delivered, but remained an escrow. To support this proposition, reference was had to the following cases: Wells *v.* Dill, 1 Martin's R. 592, and to Leaf *v.* Gibbs, 19 Eng. C. L. Rep. 475.

The Supreme Court of the U. S. sustain the opinion of the Supreme Court of Louisiana in the case of Wells *v.* Dill, in which it is said that as the bond upon which suit was brought, was drawn in the name of one Blanchard as principal, and the defendant, Dill, and one Walter Turnbull, as sureties, and the signatures of Blanchard and Dill only are affixed, that Dill's signature to the obligation did not bind him.

But it is to be remarked, that this ruling was in conformity to the civil law, which declares the contract incomplete until all the parties contemplated to join in its execution, affix their names to the bond.

"The law (say the Supreme Court of Louisiana) presumes that the party signing did so *upon the condition* that the obligors named in the instrument should sign it." Mr. Justice McLean adds, in reference to this decision, that "There can be no doubt, that under the civil law, the principle is correctly stated by the court."

The doctrine of the common law is said by the same judge to be too well settled to be controverted: that where an instrument is delivered as an *escrow*, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen. The acknowledgment (continues Justice McLean) of the bond by Abner L. Duncan, and afterwards by John Carson, unconditionally, and its delivery to the government, would seem to rebut the inference drawn by the plaintiffs against its validity, from the simple fact of its not having been signed by Thomas Duncan. This case, then, instead of supporting the views of the defendants, is an authority against them.

In support of the views we have expressed, reference may be had to the case of Stewart *v.* Bochm, adm. of Jacob Swan, 2 Watts' R. 356. The action was upon a joint and several note, under seal, signed by Ringle and Dasher, who were principals, and Jacob Swan, who was a surety. As a defence, it was insisted by the administrators of Swan, that as Dasher signed and sealed the note in the name of the firm of Ringle and Dasher, without authority, that Ringle was not bound as it was the intention of the parties he should be, and that, therefore, a recovery could not be had against the surety. In answer to this defence, the court say, "where the obligee has acted with good faith, what has he to do with the mistakes or misconceptions of the obligor?" In the case of Cutter *v.* Whittemore, 10 Mass. 450, it was held that a bond written as if to be executed by three, as joint and several obligors, although executed by two, is nevertheless a valid bond. See, also, Adams *v.* Bean, 12 Mass. 140.

Upon the whole, I am of the opinion, that upon the facts of this case the plaintiffs are entitled to judgment, and it must be so certified.

Certified accordingly.

AGENT OF STATE PRISON *v.* LATHROP.

The statute, Sess. L. 1842, p. 180, requires the agent of the state prison to give notice, in a newspaper, for sealed proposals for letting the convicts. The agent of the prison, without giving such notice, hired convicts to defendant for a term of years. The contract was held to be void—the mode of letting prescribed by the statute being a limitation on the power itself, and not merely directory to the agent of the prison.

Under the general issue in covenant, the defendant may show the deed is not his by proving a lack of power in the agent who executed it on his behalf.

ERROR to Jackson Circuit Court. Henry B. Lathrop brought an action of covenant, in the circuit court, against the agent of the state prison, for a breach of articles of agreement, by which the agent of the the prison had let to him the services of a number of convicts for a term of years, and recovered a judgment for $5,735 63. The convicts were let by the agent of the prison, under an act entitled "An act authorizing the agent of the state prison to lease, for a term of years, the labor of convicts in the state prison." Sess. L. 1842, p. 130. The first two sections of the act are as follows:

"Sec. 1. That it shall be the duty of the agent of the state prison, and he is hereby authorized to employ the convicts confined in said prison at mechanics' labor, or so many of them as, in the opinion of the agent, will best promote the interest of the state, for a term of years, not exceeding five years.

"Sec. 2. That it shall be the duty of the agent to give at least twenty days' notice, in some newspaper printed in the village of Jackson, or city of Detroit, for sealed proposals for letting the convicts for said labor of all or any of those branches now carried on or may hereafter be carried on in said prison: that the notice shall specify the branch or branches, and the length of time for which each branch will be let."

On the trial, a number of exceptions were taken by defendant to the ruling of the court, and among others the following: The execution of the agreement having been admitted by defendant, theplaintiff offered it in evidence. Defendant objected to its reception as evidence, until the plaintiff should show the agent of the prison had given notice of the letting of the convicts, as required by the second section of the aforesaid act. The objection was overruled by the court, and defendant excepted. After plaintiff had closed his testimony, defendant called the clerk of the prison, who was sworn, and testified that he had been clerk of the prison for seven years last past. Defendant then offered to prove by the witness, that no notice of the letting of the convicts had been given by the agent of the prison, previous to the making of the contract with the plaintiff, and that no sealed proposals were made by plaintiff. This evidence was objected to by plaintiff and the objection sustained by the court, and defendant excepted. Other exceptions were taken in the course of the trial, but it is unnecessary to state them.

Lothrop, attorney general, for the plaintiff, in error.

J. M. Howard, for the defendant, in error.

By the court, WING, J. The counsel for the defendant in error insists that the second section of the act was simply directory, and whether the agent did or did not comply with its provisions, the rights of the defendant were in no wise affected thereby.

The first section of the act does not in terms authorize the agent of the prison to let the services of the prisoners. No one, in reading this section, would be likely to maintain that anything was intended by it, further than the employment of the prisoners by the agent, in the prison. It is only by reading the second section that we are informed that the convicts are to be let Whatever may have been the general powers of the agent conferred by other laws, in reference to the objects indicated by this law, his duties are defined. It is manifest, from an inspection of the different sections, that the legislature supposed it would be more beneficial to the state to let the services of the prisoners, than to supply materials, from the manufacture of which a profit might be made, that would contribute to defray the expenses of the prison.

With a view to insure competition, and to give to every one an opportunity of bidding for the labor, the power to let the services of the convicts is coupled with a requirement that the agent should give notice to the public, in a specified mode, and for a specified time, for sealed proposals. The object of this is clearly manifest. It was intended, if possible, to prevent collusion between the agent and contractors, and to secure to the state the highest price that could be obtained for the labor of the convicts.

It was foreseen that it was possible, and even probable, that the agent, in common with many public agents, might from corrupt motives sacrifice the interest of the state to secure to himself or his friend the benefits which it was desirable the state should derive from the services of the convicts. The legislature, therefore, wisely prescribed the mode in which the agency was to be executed: and if it was not intended this mode should be pursued, why was it prescribed in the law and connected with the acts authorized to be done? There are no general terms used in the law which denote an intention to clothe the agent with discretionary powers as to the mode of letting contracts. He is simply authorized to do certain things in a certain way, and all this is set forth in a public law, which all may read and which all are bound to notice, and particularly all who may attempt to execute any power under, or derive any benefit from, its provisions. It distinctly points out the extent of the power given, and the mode of its exercise, and says to agent and contractor, this is the way, walk ye in it. I therefore think that that part of the second section which is claimed to be directory, enters into and gives effect to the power itself, and is a limitation upon it, and that any attempt to bind the state without observing all the prescribed proceedings, must be abortive.

This view of the subject would seem to render it unnecessary to examine the authorities cited by the counsel of defendant. But I shall refer to them with a view to show that they cannot apply to this case, even upon the grounds assumed by him.

In the case of The People *v.* Allen, 6 Wendell 486, a court martial was ordered on a day after the time prescribed by the law, fines were imposed, collected and paid over to the sheriff, and an action was brought to recover the money. It was objected, that the court martial was not legally convened. The court, in deciding the case, say, that "when a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be regarded as directory merely, unless the nature of the act to be performed or the language used show that the designation of time was considered as a limitation of the power of the officer;" and the judge proceeds, "there is nothing in the nature of the power given, or in the manner of giving it, that justifies the inference that time was mentioned as a limitation."

In the case of Jackson *v.* Young, 5 Cowen 269, it was held, that the sheriff's omission to file a certificate of sale according to the statute, would not prejudice the purchaser—the act was not a condition precedent, but merely directory.

In the case of Jackson *v.* Bartlett, 8 John. R. 361, it was held, in an action of ejectment against a purchaser of land at a sheriff's sale, that the regularity of the execution could not be questioned. The court say, if an execution is issued after a year and a day, without revival of the judgment by a *scire facias*, it is only voidable at the instance of the party against whom it issued. A purchaser cannot be affected by any matter subsequent to the sale, arising between the parties to a judgment to which he is a stranger.

And in the case of Jackson *v.* Rosevelt, 13 John. R. 97, it was held, that a sale under execution to a *bona fide* purchaser, could not be defeated for irregularity in the judgment or execution, on the ground that no levy was made, until after the return day.

It will be seen, I think, that these cases can have no application to the case before us. The first two refer to mere questions of time, in which the rights of individuals could not be affected by the observance or non-observance of the directions contained in the law. And the last two cases proceed upon the ground that the *bona fide* purchaser is not supposed to know, and is not required to ascertain, whether proceedings in a court were strictly regular, or whether the officer selling had done his whole duty, if the court had jurisdiction, and the officer had an execution authorizing his making the sale.

There is, however, a class of cases which exhibit the correct application of principles bearing upon this case, and which I will now proceed to notice and state.

In the case of Denning v. Smith, 3 John. Ch. R. 332, it appeared that under a law of New York, commissioners in the county of Green were authorized to loan money upon mortgages, and on failure of the mortgagor to pay according to the terms of the mortgage, the mortgaged premises vested in the state, but the commissioners were bound to advertise a sale of the mortgaged premises in three public places, and out of the proceeds of the sale the state was to be paid, and if any balance remained the mortgagor was to have it. In this case the mortgage was not paid, and the commissioners did not comply with the law in advertising. The sale was secret and clandestine. The chancellor, in deciding the case, said: "The act required the notices to be put up in three of the most public places in the county. The object, doubtless, was, to diffuse as widely as possible the knowledge of the sale, and of the cause, and the subject of it. This step was absolutely requisite in order to do justice to the parties concerned in the land, and in the moneys to arise from it." "Sales of real estate by public officers, of one description or another, have become so frequent, and have excited such cupidity, &c., that there is very great danger of injustice, unless we support strictly the checks and guards provided by law against abuse." Apply this reasoning to this case, and it is equally applicable and forcible. The chancellor proceeds, "The commissioners were bound to use diligence and judgment in selecting the public places best calculated to bring notice of the sale home to the mortgagee, and to all who were most likely to enter into competition for the purchase." The chancellor, referring to a class of cases similar to those cited by the defendant in this case, remarks, "It was not a sale under a judgment or a decree, where the purchaser has the right to presume every thing to have been legally done. Here was a special trust to be executed by the commissioners of loans, for the benefit of the state, and of the party entitled to the surplus, and all their authority to sell was under the statute, prescribing the mode. If the sale by the commissioner would be valid upon a short or defective notice, it would be valid without any notice, and this, surely, cannot be maintained. A special authority must be strictly pursued, and every purchaser is to be presumed to know that special authority in this case, for it is contained in the act, and if he purchases in a case in which that special authority was not pursued, he purchases at his peril." The sale was adjudged void. See Nixon v. Hyserott, 5 John. R. 57.

These same principles are sustained in the case of Sandford v. Handy, 23 Wendell 260. In this case, Judge Nelson says, in commenting upon the case in 5 Johnson, "There the power was necessarily in writing, and subject to the inspection of the party: this he is presumed to have known, and no good reason exists for binding the principal beyond the scope of it. If the party neglects to call for the power and judge for himself, it is his own fault." On page 268, he remarks: "The whole current of authority shows that unless the manner of doing the particular act is prescribed, even a special agent will be deemed clothed with the necessary and ordinary means of accomplishing it."

Judge Cowen says, in the case of the North River Bank v. Aymar, 3 Hill 270, "Whenever the very act of the agent is authorized by the very terms of the power; that is, whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent—such persons are not bound to inquire into facts *aliunde*."

In the case of The Newburgh Turnpike Company v. Miller, 5 John. Ch. R. 101, the chancellor, in commenting upon the distinction between words in a law which are imperative, and those which are directory, says, at page 113, "The principle to be deduced from the cases, is, that whenever the act to be done under a statute is to be done by a public officer, and concerns the public interest, or the rights of third persons, which require the performance of the act, then it becomes the duty of the officer to do it." See, also, the case of Malcom *v.* Rogers, 5 Cowen 193, in which the court recognize the rule laid down by Chancellor Kent in the case last cited. Also, State of Illinois *v.* Delafield, 8 Paige 529, where the Chancellor maintains the rule stated above, that the contractor with an agent appointed by or under a law, must see to it that the agent strictly pursues his powers, and that all are bound to notice the law.

The statute was intended for the benefit of the state as well as those who may contract with it, through the agent; and it must be so construed as to guard the rights of the state equally with those of the contractor. Indeed, it appears to me hardly to admit of interpretation. Its language and the intent are so plain, and the duties of agent and contractor are so obvious, and a compliance with the duties set forth so necessary to carry into effect the object of the law, that I do not feel warranted in citing more cases.

There can be no ground for the presumption insisted upon by the defendant. I regard the plaintiff as the special agent of the state: the statute makes him so for a particular purpose only, and he is limited to the performance of his duty in a particular way. The limitation is known to the person with whom he deals: it is embraced in the law conferring the power, and if the instructions were disregarded, the principal was not bound by his act. It would have been otherwise if the limitation had been private. In that case the agent might have accomplished the object in violation of his instructions.

But there is another objection to the ground taken by the defendant's counsel, which grows out of the duties which were incumbent on him at the time he entered into the contract. He was to be an actor, and was required to perform an act necessary to the validity of his contract. He was bound to hand in to the agent sealed proposals. It is not shown that he did so, and the offer was to prove that he never did submit any sealed proposals to the agent. He cannot ask that the presumption of which he asks the benefit can apply to his own duties.

The action is, in effect, against the state. The agent has not, or is not presumed to have, any personal interest in it, and his acts can only bind the state if done pursuant to the law. His power only arises from the performance of the acts required to be done. If he has failed in his duty to the state, the plaintiff is not bound.

We have thus far been endeavouring to show that the validity of the contract depended upon a strict compliance on the part of the agent and the contractor with the requirements of the statute; and I have stated my opinion that, to entitle the defendant to recover, he must show the power of the agent to bind the state, and this must be done by proving his strict performance of his duty. This was incumbent upon him at the trial; and even if he had shown a prima facie case, it was competent to the plaintiff to have shown negatively by proof that the agent and contractor neglected their duty, with a view to meet such prima facie case.

But the question is made, whether this proof was necessary on the part of the plaintiff below, or permissible to the defendant below, under the issue formed. I think it was. The issue is *non est factum*, as in the case in 23 Wendell cited above, under which it may be contested whether the deed is the plaintiff's deed; and that it is not, may be shown by proving a lack of power in the agent thus to bind the state or himself as agent, and thus show it is not the plaintiff's deed.

It is but an act of justice to the judge who tried this cause at circuit to say, that the point upon which this decision is based, was raised after the trial had progressed many days, and after it had become apparent the case would be carried to this court; and therefore the decision made by the judge upon this point was so made with a view to have all the points in the case, which could be raised, decided in this court.

Judgment reversed.

WILLIAMS *v.* HUBBARD ET AL.

The return of an execution on the return day is a good return for the purposes of a judgment creditor's bill under the statute.

Where the officer returned, to an execution against two defendants, that they had no goods or chattels, lands or tenements, without in terms negativing the fact that either of them had, the return was held sufficient.

On a judgment creditor's bill, the regularity of the judgment and execution cannot be inquired into.

Where the test day of an execution, and the day a levy was made, are stated in the bill, but not the return day of the execution, the court will take judicial notice of the terms of the court out of which the execution issued, for the purpose of ascertaining whether the levy was made in the life-time of the execution.

Where one of several judgment debtors is wholly irresponsible and destitute of property, he need not be made a party to a judgment creditor's bill.

What is a sufficient allegation that E. P. H. was the assignee in bankruptcy of W.

APPEAL from the Court of Chancery. A bill was filed by Williams against Hubbard, Barton and Mooney, for the purpose of reaching equitable assets belonging to Hubbard, the judgment debtor, and to set aside a conveyance of real estate, made by Hubbard to Mooney, to defraud creditors. The bill stated the obtaining of a judgment by Williams against Hubbard and one Cooper, who was not a party to the bill, in the Oakland Circuit Court, on the 30th March, 1841; the issuing of an *alias fi. fa.* on 21st December, 1844 (a *fi. fa.* having been previously issued), returnable the second Tuesday of June thereafter, and that the sheriff, on the tenth of June, returned he had made diligent search within his bailiwick for goods and chattels, lands and tenements of Hubbard and Cooper, and could find none whereon to levy the execution, and therefore returned it unsatisfied: that on the 18th February, 1846, a *pluries fi. fa.* was issued, and that on the 20th day of the same month, for want of goods and chattels, the sheriff levied on certain real estate as Hubbard's, which the bill charged had been conveyed by Hubbard to Mooney, and subsequently, at Hubbard's request, by Mooney to Barton, in fraud of Hubbard's creditors: that Cooper, the co-judgment debtor, was wholly irresponsible and destitute of property, real or personal: that on 21st March, 1843, Williams was declared a bankrupt, by the district court of the United States for the district of Michigan, and that, by virtue thereof, all the property, effects, and rights of property of Williams became divested out of him and vested in Eurotas P. Hastings, the official or general assignee in bankruptcy, appointed and designated, under the act of congress, by the said district court; and that Hastings, on the 12th June, 1843, for a valuable consideration, assigned and transferred unto Williams the aforesaid judgment. The bill also contained all the usual allegations of a creditor's bill under the statute. Hubbard and Barton demurred, and, the court below having overruled the demurrer and entered a decree in favor of Williams, they appealed to this court.

Richardson and Stelle, for the appellee.

Goodrich, for the appellants.

By the court, Miles, J. The cause of demurrer, which I shall first notice, is that the *alias fi. fa.* was returned *on* the return day, which, it is insisted, is a day too soon, as a levy might be made on that day.

By the terms of the writ, the sheriff is required to return it upon the return day; and although he may keep it in his hands until the last moment of that day, for the purpose of making search for property upon which to levy, yet he is required to return it *upon* that day; and if we give the officer full credit for a faithful performance of his duty under the law, we may well presume the writ to have been returned on the last moment of that day.

I have been unable to find any case holding the doctrine that, for the purpose of a creditor's bill, the execution was not well returned upon the return day.

2. It is also objected, that the return upon the *alias* execution is insufficient, being in general terms that the defendants (Hubbard and Cooper) have no goods or chattels, lands or tenements, &c., without in terms negativing the fact that either of them had any separate property.

The return is as broad as the command in the writ, and when there is more than one defendant, the form of execution now in use has ever been held sufficient to include not only the joint property of all, but the several property of each, unless some one of them has not been served with process, in which case an endorsement upon the back of the execution to that effect is requisite: the legal meaning of the return, is, that neither the defendants jointly or separately have any property of which the sheriff could levy the debt. 7 Paige 56.

3. It is also urged, that it does not appear upon the face of the bill that the first execution was regularly issued and returned, and that unless this is shown to have been done, the issuing of the second execution was unauthorized and void.

It seems to me, that a rule requiring an exhibition of the regularity of all the proceedings upon the judgment in the law court, would lead to needless prolixity in creditors' bills, and be productive of no good results. All that is required in this respect to give the court jurisdiction, is, that the complainant should show that he has had execution upon his judgment in the hands of the proper officer, and that he has been unable to find any property liable to execution upon which he could levy.

The court of chancery is not authorized to decide upon the regularity of the judgment and execution in the court of law. 8 Paige 373. This is stated to be an *alias* execution—that pre-supposes a first execution, and the bill states that one was issued, and that is enough.

4. It is also objected, that it does not appear that the levy was made in the life-time of the *pluries* execution—that the return day is not stated.

The test of this writ is alleged to have been on the 18th day of February, 1846, and that the levy was made on the 20th day of the same month. The court will take judicial notice of the terms of the circuit court, and as the writ was, by the statute then existing, to be made returnable at the next term after it was issued, the levy is thereby shown to have been while the *fi. fa.* was in life.

5. The next ground of demurrer is, that the judgment debtor, Cooper, is a necessary party.

This point was much pressed on the argument. I have examined all the cases bearing upon it, and propose to consider it fully, but as the subject requires in its discussion a close obedience to authority, no more must be expected than a careful consideration of the cases referred to, in the hope to get a correct view of the principles which govern this portion of what is termed by Judge Story, "that most intricate and important branch of equity pleadings, the subject of the necessary and proper parties to bills." Preface to Story's Eq. Pl., p. 7.

The general rule undoubtedly is, as stated by Lord Hardwick, in Madox *v.* Jackson, that where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account, and are entitled to contribution where one pays more than his share of the debt. 3 Atk. 406. Angerstein *v.* Clark, was decided upon the same principle. 2 Dickins 738.

In the case of Cockburn *v.* Thompson, 16 Ves, 327, the strict rule is stated to be, that all persons materially interested in the subject of the suit ought to be made parties, that there may be a complete decree between all parties having material interests; but that this is a general rule, established for the convenient administration of justice, and must not be adhered to in all cases, and that there are several well known cases of exception.

Among the various cases admitting the general principle, but forming an exception upon circumstances, is that of Madox *v.* Jackson, before referred to, decided in 1746. There there were three obligors in a bond; the obligee brought the principal and the representatives of one of the sureties before the court, and stated that the third was dead and his estate insolvent. It was held, that under the circumstances of the case he was not a necessary party: that this was an exception out of the case requiring a contribution, as there were no personal assets, therefore the representative of the deceased obligor was an unnecessary party.

Angerstein *v.* Clark, was decided in 1790. The chancellor recognized the case of Madox *v.* Jackson, and held, that to a bill against an obligor in a joint and several bond, an insolvent co-obligor need not be made a party.

In Bland *v.* Winter, 1 Sim. & Stu. 247, the general rule was recognized, that to a bill filed by an obligee of a joint and several bond for the payment of his debt, all the obligors must be made parties. In that case no reason was shown for making it an exception.

It should be observed, that in deciding the case of Angerstein *v.*

Clark, Lord Thurlow had occasion to consider not only the case of Maddox *v.* Jackson, but also another case, Collins *v.* Griffith, 2 P. Wms. 314, decided by Lord King in 1725, upon reasoning which, says Judge Story, it seems difficult to answer. Story's Eq. Pl. 159, note. The ground upon which the decision in the latter case seems to have been placed, is, that the obligee may in equity, as at law, sue the bond severally: that the creditor lends his money upon the terms of having security which he might thus sue if he thought fit; and if it were otherwise, what was intended to strengthen the security would tend to weaken it, as he might not be able to find all the debtors, and if some were dead their heirs as well as executors are to be made parties, and the suit would be subject to continual abatements. He held (as a natural result from this doctrine), that if any obligor had paid all or a part, he who is sued must bring a bill and have it allowed, and that it must lie with him to enforce contribution to the payment of the debt. The same was held in Stanley *v.* Stock, by the same chancellor, in 1730. Moseley's R. 383. This doctrine, however, has been overruled in the cases to which I have referred, and the general rule is established in England as I have before stated it.

In the case of Van Cleef *v.* Sickles, in New York, Chancellor Walworth ruled, that it is not necessary to make all the joint debtors against whom judgment was obtained parties defendants to a creditors' bill, provided it distinctly appears in the bill that these who are not joined in the suit are wholly insolvent and destitute of property. 5 Paige 505.

The chancellor sustains the general rule, as before stated, but makes this an exception upon the circumstances.

Upon the argument, much reliance was placed upon the cases referred to, showing the necessity for the assistance of the other party in taking the account. It is true, the bill prays that an account may be taken of the amount due upon the judgment, but equally true that the bill contains an express, positive allegation, that the whole amount of the judgment is still due and unpaid, over and above all set-offs. This is admitted by the demurrer, and being so admitted, there is no ground for making the other defendant in the judgment a party, either because he may have paid any part of the judgment, or for any assistance in taking the account. 3 Atk. 406.

It seems to me, then, as this bill contains an averment that Cooper is insolvent and entirely destitute of property, the necessity of making him a party is dispensed with.

The last objection necessary to be noticed is, that there is no sufficient averment that Eurotas P. Hastings was appointed assignee in bankruptcy of the complainant—that is, assignee in this particular case.

The statute is, that the property and rights of property of the bankrupt shall, by mere operation of law, from the fact of his being declared a bankrupt by a decree of the court, from the time of such decree be divested out of him; and the same shall be vested, by force of the same decree, in such assignees as from time to time shall be appointed by the court for that purpose.

The bill follows the language of the statute in saying that the complainant was divested of the property by the decree, and that, by it, it was vested in Mr. Hastings, assignee appointed by the court. If the words "for that purpose," had been added, there could not have been any doubt of the sufficiency of the allegation. They are not added, but it appears to me it must be understood that the assignee was appointed for that, and for no other purpose; and that, under the more liberal rule applicable to pleadings in equity, than that applied to law pleadings, where greater strictness is required, this statement must be held to be sufficient. Story's Eq. Pl. sec. 240.

The People v. John Doe.

A challenge to the array must be in writing.

The defendant, on being arraigned in the county court on an indictment for murder, requested to be tried before the circuit judge, under the provisions of sec. 7 of the act to regulate and define the jurisdiction of the circuit and county courts. Sess. L. 1848, p. 237. On the day appointed for the commencement of the next regular term of the circuit court, the circuit judge did not appear, and his absence was noted on the journal by the clerk, and the court adjourned to the next day, when the circuit judge appeared and assigned a day for the trial of the cause. It was held, that the statute requiring the assignment to be made on the first day of term was, as to time, directory only, and that the assignment made on the second day of term was good within the statute.

An order made under the act, Sess. L. 1848, p. 287, by the county judge for summoning a jury to try a cause before the circuit judge, more than three days before the day assigned for the trial, is in compliance with the letter and spirit of the act.

The most usual mode of trying the impartiality of a juror, challenged for favor, is by triers appointed for that purpose, on the demand of the challenging party, but it is not the only legal mode.

Where a juror is challenged for favor, and the challenging party, when asked by the court how he will have the challenge tried, refuses to indicate the mode of trial, it may be tried by the court by administering an oath to the juror, and propounding questions to him.

If a party or his counsel interpose a challenge for favor, or raise any other preliminary question involving an inquiry, and then neglects or refuses to move the trial or examination thereof, he thereby waives such challenge or question.

The degree of force, or the means to be employed, in protecting one's person or personal liberty, must depend on circumstances. To justify a person in taking the life of another, it must appear his safety required him to do so.

On an indictment for murder generally, as at common law, the prisoner may be found guilty of murder in the second degree, under R. S. ch. 158, p. 658.

ERROR to St. Joseph Circuit Court. Indictment for murder.

Lothrop, attorney general, for the people.

Chipman, for the defendant.

By the court, GREEN, J. The defendant was indicted in the St. Joseph county court, in December, 1848, for the crime of murder in the first degree. Being a stranger, and his name being unknown to the jurors, he was indicted by the fictitious name of "John Doe," and also by a description of his person. On being arraigned, he pleaded not guilty, and requested to be tried before the circuit judge, pursuant to the provisions of section 7 of "An act to regulate and define the jurisdiction of the circuit and county courts," Sess. L. 1848, pp. 237, 238. This request was duly noted by the clerk of the circuit court upon his docket. On the day appointed for the commencement of the next regular term of the circuit court for St. Joseph county, the circuit judge did not appear in said court, and his absence was duly noted upon the journal by the clerk, and the court adjourned to the next day, when the circuit judge appeared and assigned the 27th day of December, 1848, for the trial of the cause, and notified the county judge and prosecuting attorney thereof. *More* than three days before that assigned for the trial, the county judge made an order for the summoning of a petit jury for the trial of the cause. On the day assigned for the trial, and when the petit jury were about to be called for that purpose, the counsel for the prisoner challenged the array, and assigned the following causes, viz:

"1. That the order naming a day for the trial of said indictment, was not made by the circuit judge until the second day of the term, as appears by the journal.

"2. The county judge did not make the order for the jury to try the cause, three days previous to the day named for trial."

Another cause was assigned, which was abandoned upon the argument.

It is a sufficient answer to this challenge, that it was not made in writing, but orally, and was not reduced to writing in any form until after it was overruled by the court, when the alleged causes of challenge were allowed to be entered upon the journal, at the request of prisoner's counsel. 1 Chitty's Cr. L. 546.

But I am of opinion, that the objections assigned could not prevail in any form. The statute requiring the circuit judge to assign a day for the trial, is clearly directory so far as *time* is concerned, and in case of his refusal to assign a day, the supreme court, upon a proper application, would undoubtedly compel him to assign a day, even after the first regular term subsequent to the request of the defendant had gone by.

The order for summoning a petit jury having been made *more* than three days before that assigned for the trial, the statute was in that respect fully complied with, according to its letter and spirit.

The next question arising upon the bill of exceptions grows out of the following proceedings:

"Lewis Miller having been called as a juror by the clerk, the counsel for the prisoner rose and remarked that he challenged the juror *for favor.* The court desired the clerk to administer the usual oath to the juror, whereupon the counsel for the prisoner objected. The court then requested the counsel for the prisoner to indicate what course he desired to be pursued to test the validity of the challenge. The counsel for the prisoner said he had no suggestion to make, that he left the court to adopt its own course—insisting upon his objection. The court having caused the usual oath to be administered to the juror, stated to the counsel for the prisoner that he could propound such questions to the juror as he might deem proper. The counsel for the prisoner declined assigning any cause of challenge, except as aforesaid. The counsel for the prisoner was asked if he desired *triers*, but he declined saying whether he would or would not." The counsel for the prisoner excepted to the ruling of the court.

"A challenge to *the favor* was understood and admitted to be made as to the remaining jurors—same disposition of question."

The counsel for the prisoner insists, that upon his challenging the jurors for favor, it became the duty of the court, on its own motion, to appoint triers, and that the court had no power to proceed upon the challenges in any other manner. In this the counsel is mistaken. The most usual mode of trying the impartiality of a juror challenged for favor, is by triers appointed for that purpose, on the demand of the challenging party; but this is not the only legal mode.

In the case of The People v. Rathbun, 21 Wendell 510, the jurors, on being challenged for favor, were sworn and examined, and their competency determined by the court; and this having been done without objection, the court subsequently refused triers when demanded, and it was held not to be error. See, also, 4 Wendell 229, The People v. Mather.

In this case, the court requested the counsel for the prisoner to indicate what course he desired to be pursued to test the validity of the challenge, and he replied that he had no suggestion to make, but that he left the court to adopt its own course—still insisting upon his objection. It does not appear, except by inference, to what the objection was made, but it seems to have been to the administering of the usual oath to the juror by the clerk.

The counsel for the prisoner appears, in this instance, to have entirely misconceived his own duty, as well as the power and duty of the court, and I think the court would have been entirely justifiable, under the circumstances of this case, in disregarding the challenge, if it were not its imperative duty to do so. Of what does the party complain? Did the court deny any application or motion of the prisoner's counsel? No; but the counsel for the prisoner assumes that the court, by omitting to appoint triers, deprived the prisoner of a right. The answer is, that by not claiming the right, he waived it; and that it was expressly waived by leaving the court to adopt its own course. If a party or his counsel interpose a challenge for favor, or raise any other preliminary question involving an inquiry, and then fold his arms and neglect or refuse thereupon to move the trial or examination thereof, he thereby waives such challenge or question, and it is very clear that the court may properly disregard it.

On the trial, one E. H. Pride, a witness sworn on the part of the prosecution, testified that he was an acting justice of the peace of the township of Fawn River; that two men called at Toll's store in said township where witness was, one of whom was Hathaway, who resides there, and the other called himself a constable from Indiana. The counsel for the prisoner objected to the witness testifying to what he called himself, which objection was overruled, and the testimony admitted. The witness was then asked what they wanted him to do, and he was proceeding to say that they asked him to aid in arresting a man who had stolen a span of horses in Indiana, when the counsel for prisoner objected to the evidence: the court overruled the objection, and the evidence was received. To these rulings of the court the counsel for the prisoner excepted.

It appears further, from the bill of exceptions, that upon these objections being made, the court decided, that if the testimony was merely introductory, and necessary to explain other facts material to the issue, the testimony might be competent; and that the prosecutor thereupon stated to the court that such was its character, whereupon the objections were overruled.

The object of this testimony, in connection with other evidence given upon the trial, appears to have been, to show the character of the transaction which resulted in the death of Fanning. John C. Richmond, a witness subsequently introduced, testifies to a conversation which he had with the prisoner on the same day, and after his arrest, in which the prisoner confessed having stolen a span of horses, and stated, as a reason why he ran, that when the constable came, he knew him, and knew what he was after. The testimony, taken together, showed that both the prisoner and those who were pursuing him, including Fanning, understood that they were only endeavoring to arrest the prisoner on account of a supposed theft committed by him, and that they were not pursuing him for the purpose of doing any violence to his person.

In this view of it, the testimony seems to have been properly received, though it did not appear that those making the attempt had any legal right to arrest the prisoner.

The prisoner was charged with murder in the first degree, and the testimony in question was very proper, as tending to show the *scienter*. See The People *v.* Rathburn, 21 Wendell 510; and The People *v.* Bodine, 1 Denio 283.

The charge of the court upon the specific instructions which the prisoner's counsel requested might be given by the court, was as favorable to the prisoner as he had a right to require. The court instructed the jury that "a person was authorized to defend his person or personal liberty to the extent claimed by the counsel for the prisoner; but that the degree of force, or the means to be employed in protecting his person or personal liberty, must depend upon circumstances: that to justify a person in taking the life of another, it must appear that his safety required him to do so: that in the case before the court, there was no evidence that the person or personal liberty of the prisoner had been assailed by the deceased when the wounds were inflicted upon him by the prisoner, which it is admitted by the prisoner proved fatal."

In the case of the Commonwealth *v.* Selfridge (Selfridge's Trial, p. 160), the principles of law relative to destroying life in self defence are very clearly and perspicuously laid down by Mr. Justice Parker. He says:

First: That a man who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power, otherwise, to save his own life or prevent the intended harm; such as retreating, as far as he can, or disabling his adversary without killing him, if it be in his power.

Secondly: When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all.

Thirdly: When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

By comparing this language, which expresses the well established and recognized doctrine on this subject, with that used by the Chief Justice in the case under consideration, it is very apparent that the prisoner had nothing to complain of in that respect.

But it is insisted that the last clause of the charge contains a statement not warranted by the evidence. Upon a careful examination of all that appears in the bill of exceptions, I cannot discover that it is not warranted.

As to the question of identity between the prisoner and the person who inflicted the mortal wounds upon Fanning, it is only necessary to remark, that so far as appears, all the witnesses who testified in relation to the infliction of the wounds, and the confession of the murder afterwards, identified the prisoner at the bar, and that no question of identity appears to have been made on the trial.

Finally, it was insisted on the argument, that inasmuch as the indictment was for murder generally, as at common law, and the jury found the prisoner guilty of murder in the second degree only, no judgment could be given upon the verdict.

That is precisely the form of indictment contemplated by our statute. R. S. ch. 153, p. 658. The statute does not undertake to define the crime of murder, but only to distinguish it into two degrees, for the purpose of graduating the punishment. This appears very evident from section three of the chapter referred to, which is as follows:

"The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly."

If it were necessary to frame the indictment so as to charge murder of a particular degree, the section here quoted would be entirely nugatory.

Upon the whole, there does not appear to be any good ground for reversing the judgment upon the record, or granting a new trial upon the bill of exceptions.

Judgment affirmed.

THE PEOPLE v. THE DETROIT AND PONTIAC RAIL ROAD.

A rail road company incorporated before the late revision of the statutes, whose charter is silent as to taxation, is liable to pay the specific tax imposed by R. S. ch. 21, sec. 5, p. 121.

CASE reserved from Wayne County Court.

The only question in the case, was, whether the rail road company, which was incorporated in 1834, and whose charter is silent as to taxation, was liable to pay the specific tax imposed on rail road, canal and turnpike companies, by R. S. ch. 21, sec. 5.

Lothrop, attorney general, for the plaintiff.

Douglass, for defendant.

By the court, MILES, J. The question submitted to the court in this case, is, whether the defendant is liable to pay the specific state tax imposed by ch. 21, R. S., p. 121. The power to tax the property of corporations as well as that of individuals, seems to be well established. This, however, was not accomplished without a struggle on the part of those whose interests have been thus seriously affected. The charter of the Providence Bank in the state of Rhode Island, was granted in 1791, and previous to the passage of an act of the legislature in 1822, imposing a tax upon bodies corporate within the state. The collection of this tax was resisted, upon the ground that the act was repugnant to the constitution of the United States, inasmuch as it impaired the obligation of the contract created by the charter of incorporation. Before the case was argued, the doctrine had been settled, in the Dartmouth College case, that a contract entered into between a state and an individual, was as fully protected by the 10th section of the 1st article of the constitution, as a contract between two individuals: and it was not denied that a charter incorporating a bank was a contract, and the question was, whether that contract was impaired by taxing the bank. The discussion of this question necessarily involved the inquiry whether the power of taxation was inconsistent with the charter: and it was strongly insisted that it was, mainly for the reason that this power might be so exercised as to destroy the object for which the charter was given.

Chief Justice Marshall, in the opinion delivered by him deciding the case, uses this language: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic." "This is an original principle, which has its foundation in society itself—it is granted by all for the benefit of all—it resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies."

In reply to the proposition of counsel, that a power which is in itself capable of being exerted to the total destruction of a grant, is inconsistent with the grant, and is, therefore, impliedly relinquished by the grantor, though the language of the grant contains no allusion to the subject, he says: "If this be an abstract truth, it may be supposed universal—but it is not universal, and, therefore, its truth cannot be admitted in these broad terms in any case." He alludes to a grant for land made by the government, the object of which is, that the profits issuing from it shall enure to the benefit of the grantee, and yet the power of taxation may be carried so far as to absorb those profits, and then says: "We must look for the exemption in the language of the instrument, and if we do not find it there, it would be going very far to insert it by way of construction."

This case was decided at the January term, 1830, 4 Peters 514. Fifteen years before that time, the case of the Portland Bank, in Massachusetts, was decided by Chief Justice Parker. In the course of the opinion delivered, he makes this pertinent inquiry: Did the legislature, when it incorporated the plaintiffs, relinquish the right of laying an excise or duty upon the business which they should transact during the continuance of the corporation? The answer which he gives, is, "There is no express waiver or relinquishment, nor is there any strong implication of one." "The object of their charter is to enable them in a body to conduct their business as an individual, to make contracts, and to enforce them as such, avoiding the inconveniences of a partnership. This is all that is asked for by the company, and all that is given by the charter. It is a privilege to manage their business, and not an exemption from duty."

The right to impose a specific tax or excise, was made a point in judgment in that case, and was clearly and fully sustained under the provisions of the constitution of that state authorizing the legislature to impose and lay reasonable duties and excises upon any produce, goods, wares, merchandizes and commodities whatsoever. 12. Mass. 252.

In the case of Ontario Bank *v.* Bunnell, it was determined that the real and personal estate of a banking corporation was subject to taxation in a village where it was located, authorized by law to raise money by tax for certain purposes: that it was an *inhabitant* within the meaning of the act directing the tax to be assessed upon the freeholders and inhabitants of such village. 10 Wendell 186.

The power of exempting property from taxation seems to be equally well settled. The power of the state in making the grant in this case, or in any case, to impose upon the party accepting it such conditions, or to extend to it such privileges as may best comport with sound policy, within constitutional limits, seems to be conceded in the argument in the opinion in 4 Peters. In arguing whether the contract was impaired by taxing the bank, the court say, this question is to be answered by the charter itself, and that it contains no stipulation promising exemption from taxation.

The question, then, put to us, must be answered in the affirmative.

Certified accordingly.

BACON v. THE COUNTY OF WAYNE.

The county is not liable to an attorney for defending a prisoner at the request of the court, where the prisoner is poor and unable to employ counsel.

CASE reserved from Wayne Circuit Court.

J. M. Howard, for Bacon.

Stewart, prosecuting attorney, for the county.

By the court, GREEN, J. A poor person was brought before a magistrate in the city of Detroit, charged with the crime of murder. The magistrate, having satisfied himself that the prisoner was unable to employ counsel to defend him, requested Mr. Bacon, an attorney and counsellor of this court, to undertake the prisoner's defence, which he did. The prisoner was indicted and tried for the offence in the circuit court for the county of Wayne, and Mr. Bacon acted as his counsel on the trial. For these services Mr. Bacon charged the county of Wayne fifty dollars, and presented his account therefor to the board of county auditors, who rejected the claim. From the decision of the board of auditors the claimant appealed to the circuit court for the county of Wayne, where the question was reserved for the opinion of this court. On the argument of the case here, it was conceded by the counsel for the appellant that this was not a strictly legal claim against the county, but it was insisted that it was so manifestly just and meritorious in its character, that the board of auditors ought to have allowed it: that the prisoner, being charged with one of the highest crimes known to the law, involving, if found guilty, the utmost punishment inflicted for any crime except treason, and being wholly unable to employ counsel to assist in his defence, must have been entirely undefended, and perhaps unjustly convicted and punished, had not counsel been provided for him, unless some one should have volunteered in his defence as a matter of charity, which it is claimed ought not to be expected of counsel: that under these circumstances, it is due to the administration of justice, and required by the plainest principles of humanity, that counsel be provided to defend the accused, and paid by the county as a part of its just expenses in the administration of the criminal laws.

The board of auditors for the county of Wayne, and the boards of supervisors of the other counties, are authorized, and it is made their duty, to examine, settle and allow all accounts *chargeable* against their respective counties. R. S., ch. 14, secs. 3 and 29. And when any claim of any person against a county is disallowed, in whole or in part, such person is authorized to appeal from the decision of the board disallowing it, to the circuit court for the same county. *Id.*, secs. 24 and 32. Appeals from these boards are to be heard and determined in a summary manner by the courts to which they are taken. *Id.*, sec. 26.

Whether it is proper for the board of auditors, under any circumstances, to allow a claim in favor of an individual, which could not be enforced by an action at law or a suit in equity, because they shall think it morally right and just that it be paid by the county, we do not feel called upon now to decide. It is very certain, however, that if the board should allow such a claim, no appeal can be taken in behalf of the county from their determination.

Supposing them to possess the large discretion claimed for them by the appellant in this case, does it follow that the circuit court, in reviewing their decision on appeal, can control the exercise of such a discretion? I apprehend not. The court acts judicially in determining the appeal, and unless expressly authorized to be governed by its own sense of what is right and just in the premises, it acts only as the exponent of established principles of legal or equitable right, and pronounces in each case, according to the circumstances attending it, the judgment of the law, and not its own sense of what the law ought to be.

The only question for the circuit court to determine in this case, is, whether the claim disallowed by the auditors is a legal charge against the county: and, it being conceded that it is not strictly so, the decision of the board of auditors appealed from ought to be affirmed, and judgment rendered in favor of the county against the appellant for costs.

Certified accordingly.

VANDERHOOF *v.* DEAN.

D brought a suit in attachment in the county court against V, who appeared and moved to quash the attachment for an alleged defect in the affidavit on which the attachment was issued, which motion was denied. Issue was then joined, and the subject matter of the suit was afterwards submitted by the parties under the statute (R. S., ch. 129), to arbitrators, who made an award in favor of D, on which a judgment was rendered by the court. V brought error, and insisted on the supposed defect in the affidavit as a ground for reversing the judgment. *It was Held,*

1. **That the submission of the subject matter of the attachment suit to arbitrators was a discontinuance of the suit.**
2. **That as the court had power under the statute to render judgment on the award of the arbitrators, that part of the record anterior to the submission might be rejected by the court.**
3. **That the submission was a waiver of all errors up to the time of making it.**

ERROR to Wayne Circuit Court. A suit in attachment was brought by Dean against Vanderhoof, in Wayne county court, in December, 1847, and on the return of the writ of attachment a motion was made to quash it, by Vanderhoof, for an alleged defect in the affidavit on which it issued, which motion was denied. Issue was thereupon joined between the parties, and the cause continued, from time to time, until the 21st April, when an agreement was entered into submitting all matters involved in the suit to the award of arbitrators selected by the parties, and a submission was drawn up and acknowledged by them before an officer authorized to take the same. On the 2d May the arbitrators made their award, which was on the same day filed in court, awarding to Dean the sum of $89 52; and on the 18th July, on motion of Dean's attorney, a judgment was rendered in her favor on the award. Vanderhoof carried the case by certiorari to the circuit court, which affirmed the decision of the county court, and to reverse these judgments the present writ of error was brought by him.

Bishop, for the plaintiff in error.

Harvie, for the defendant in error.

By the court, WHIPPLE, C. J. The error assigned in the circuit court was founded on the decision of the county court, denying the motion of the plaintiff in error to quash the writ of attachment. The error assigned in this court presents the same question.

From the view I have taken of this case, it becomes unnecessary to determine whether the decision of the county court, and the affirmance of that decision by the circuit court, upon the motion to quash the writ of attachment, was right or wrong: that question, in my opinion is not properly before us for adjudication.

Issue having been joined, the parties thought proper to refer the subject matter of the suit to arbitrators. A written stipulation to that effect was entered into between them, and was duly acknowledged before a proper officer.

What was the legal effect of this act of the parties? It was clearly to withdraw the suit from a tribunal constituted by law, and refer the matter in controversy to the determination of a domestic tribunal of their own creation. Our statute has authorized parties to submit any controversy which might be the subject of an action at law or suit in equity (with few exceptions), to the decision of arbitrators; and when thus submitted under the regulations provived by the statute, judgment may be summarily entered on awards. If a controversy exists between persons, either is at liberty to appeal to the tribunals established by law for its determination, or, both consenting, its adjustment may be referred to judges of their own selection.

In the case before us, the defendant in error, Mrs. Dean, resorted to the county court for the recovery of a sum of money which she claimed was honestly due her from the plaintiff in error, who controverted this claim. The issue having been made up, the parties thought proper to avail themselves of the provisions of our statute, and agreed to submit the controvesy between them to the determination of three arbitrators. By this act the forum in which the cause was to be heard and determined, was changed: thenceforth, by the implied assent of the parties, it was no longer pending in the county court. No proceeding on the part of the court was asked for, or required to give validity to the act of the parties. The agreement to submit a cause pending in court to arbitrators, operates as a discontinuance of the cause in court, as effectually as if a rule to that effect had been entered under the sanction of the court; and this results from an implied understanding that, having made choice of another tribunal provided by law in which to litigate the matters in controversy between them, they will no longer prosecute the suit in the public tribunal in which it may be pending. And this implication seems reasonable and just; otherwise two or more suits may be pending in different courts at the same time, involving the same subject matter: this the law will not tolerate.

In the case of Wells *v.* Lain, 15 Wendell 99, Chancellor Walworth admits, that "a general agreement to submit to arbitration operates as a discontinuance, from the implied understanding of the parties tha the suit is to be no further prosecuted." He was of opinion, however, that "a valid submission might be made, leaving the suit in full life provided it appears from the agreement itself that such was the intention of the parties." No case is cited, and none, it is believed, can be found in support of this proposition. It was repudiated by the court of errors, as will be seen by reference to the opinion of other members of the court in the same cause. Senator Tracy, in delivering his opinion, uses this language: "Here was an agreement between the parties to arbitrate the subject matter of the suit." "It is not doubted that a parol submission in ordinary cases is valid, nor that a valid submission discontinues the suit." Again: "A *reference* under the statute is strictly a proceeding in the suit;" "but a submission to *arbitration* is not merely an agreement to discontinue, but is, *eo acto*, a discontinuance which requires no subsequent interposition of the court to give it effect." The language of Senator Maison is equally clear: "These parties, then, having a right to submit this matter to arbitration, and having agreed to do so, the suit is discontinued." The same doctrine is maintained by Senator Edwards.

The case of Larkin *v.* Robbins, 2 Wendell 505, is also in point Mr. Justice Marcy, in that case, held, that "the submission of a cause to arbitration, the arbitrators never taking or consenting to take upon themselves the burden of the submission, operates as a discontinuance of a suit pending in court." See, also, opinion of Parker, Ch. J., 17 Mass. 603; 1 Wendell 314, 516; 6 Cowen 399.

Applying the principle I have been endeavoring to establish to the case before us, I think enough appears on the record to support the judgment of the circuit and county court. The statute in relation to arbitrations appears to have been literally complied with: 1, there was a written submission; 2, that submission was duly acknowledged by the parties before competent authority; 3, an award in writing was made by the arbitrators; 4, judgment was entered for the amount specified in the award. It is said that the county court and the parties treated the agreement to submit as a proceeding in the cause. Such, I have no doubt was the fact; but this circumstance cannot affect the legality of the judgment, provided enough appears on the face of the record to support it. The county judge undoubtedly erred in treating the report of the arbitrators as an award made in a cause then pending in court, instead of an award made under the statute, and upon which he was authorized to render a judgment. But this court, in considering the case, may reject so much of the record before them as embodies the proceedings of that tribunal anterior to the report of the arbitrators. The error of the county court can in no respect affect the validity of the judgment on the award.

It was argued, that, as by the agreement of the parties to refer the cause to arbitration, the award to be made was to have "the effect of a verdict, and that judgment might be rendered on said award as upon a verdict," the obvious intention of the parties was to retain the cause in court, and that the plaintiff in error is therefore, permitted to assign errors upon any part of the record. Admitting that the views of Chancellor Walworth are right, as expressed in the case of Wells *v.* Lain, I am clearly of the opinion that this part of the agreement would, of itself, operate as a waiver of all errors up to the date of the submission. It would seem inconsistent with good faith, that the defendant below should be permitted to allege irregularities in the proceedings in the cause, after he had consented to refer the cause to arbitration, and authorized the court to render judgment in case the award should be against him. I think such an act would operate as a waiver of all errors, and that the defendant is estopped from alleging any that may have crept into the proceedings previous to the date of the submission.

It was also intimated, that the agreement to arbitrate was not within the statute, inasmuch as the award was to be considered in the light of a verdict. We have had occasion to determine, at the present term, that unless a submission is within the statute, the summary mode of enforcing an award by a judgment would be unauthorized. I cannot, however, regard this part of the stipulation as impairing the authority of the county court to enter judgment on the award. Under our statute, the award of the arbitrators may be likened to the verdict of a jury. In the one case, we have the judgment of three persons selected by the parties; in the other, the judgment of twelve persons selected in the manner provided by law. The judgment in the one case is called an award—in the other a verdict: in both cases, however, the county court have the authority, unless upon good cause shown, to render its judgment. The intention of the parties in introducing this clause in the agreement, is perfectly obvious: it was, in the language of the stipulation, "that judgment might be rendered on said award in said cause as upon a verdict." This was unnecessary; the statute gives express authority to "render judgment in favor of the party to whom any sum of money or damages shall have been awarded, that he recover the same." The court are, therefore, authorized to reject, as immaterial, this part of the agreement.

It follows, that the judgment of the circuit court must be affirmed.

Judgment affirmed.

PEOPLE *v.* HART.

The penalty given by R. S. ch. 41, sec. 1, for selling wine, brandy, rum or other spirituous liquor, without a license as tavern keeper or common victualler, may be recovered by indictment.

CASE reserved from Macomb County Court. Hart was indicted and convicted in the county court for selling liquor, contrary to the provisions of sec. 1, ch. 41, R. S., p. 184. He moved an arrest of judgment, on the ground the penalty given by the act could not be recovered by indictment, and the question was reserved by the county judge for the opinion of this court.

By the court, MILES, J. To determine the question reserved, it is only necessary to look at the different provisions of the statutes relating to the subject.

The first section of chapter 41, R. S., p. 184, forbids any person being a common seller of spirituous liquors, "on pain of forfeiting one hundred dollars." The thirty-first section provides for the recovery of all penalties and forfeitures prescribed in the chapter in an action of debt.

By section 3, R. S., p. 560, jurisdiction is conferred upon justices of the peace of all actions for the recovery of penalties or forfeitures when the amount of the penalty or forfeiture shall not exceed one hundred dollars. Section 10 of the same chapter, declares, that in all cases where the penalty or forfeiture shall be one hundred dollars or more, it may be recovered by indictment in the proper court of the county.

The county court has jurisdiction of all matters at law, civil and criminal, except in probate cases, actions of ejectment, and cases civil and criminal, which are by law made cognizable before justices of the peace.

Here, although a justice has jurisdiction in an action brought to recover the forfeiture, yet he cannot have jurisdiction of a proceeding by way of indictment to accomplish the same object.

The law makes no provision for summoning an inquest or grand jury in a justice's court, and without such jury an indictment cannot be found. Hence such proceeding must necessarily be commenced and prosecuted in the county court, where alone a grand jury can be summoned.

That part of the statute conferring power upon a justice of the peace to entertain the civil suit, contains no words of exclusion against any other tribunal. The statute confers the same power upon any other proper court, to be exercised in a different form of proceeding. The county court is the proper court to proceed in the mode indicated by the statute.

We think, then, it should be certified to the county court of Macomb county, that the motion in arrest of judgment should be overruled.

Certified accordingly.

BIDWELL ET AL *v.* WHITAKER ET AL.

Ch. 122, R. S., of proceedings for the collection of demands against ships, boats and vessels, applies to contracts made and injuries received within the state only, and not to such as have arisen without the state, and gives a specific lien on the boat or vessel for all such demands mentioned in the first section of the chapter.

It is only where a statute is ambiguous in its terms, that courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the law maker.

CASE reserved from Wayne County Court.

Van Dyke and Emmons, for plaintiffs.

Hale and Lothrop, for defendants.

By the court, WHIPPLE, C. J. This cause comes before the court upon questions reserved by the county judge of the county of Wayne.

The facts upon which the questions of law arise are as follows: The steam boat Patchin was a boat owned and registered in Buffalo, at the time the plaintiffs did certain work, and furnished materials for the repairing of said boat at the request of the owner or master, by whom the debt was contracted, which is now sought to be recovered. It further appears that the plaintiffs are ship carpenters, residing in Buffalo, where the work was done and the materials furnished. In 1848 the claim of the plaintiffs was exhibited before the county judge, who issued process, by virtue of which the boat was attached at Detroit. A bond was given and the boat released; upon this bond the suit is brought.

The precise question submitted for our determination, is, whether, under our statute, a *lien* attaches when a cause of action accrues for any of the causes specified in the first section of chapter 122, entitled "Of proceedings for the collection of demands against ships, boats and vessels."

It is not to be disguised that the solution of this question is involved in a good deal of difficulty, growing out of the conflicting provisions of the chapter above referred to. In behalf of the plaintiffs, it is contended that the statute does not give a specific *lien*, but simply provides a new *remedy* for the recovery of demands accruing under the provisions of the first section. On the contrary, it is insisted by the defendants, that, by section 1, a *lien* attaches and is coeval with the cause of action, and that the other sections provide a *remedy* by which that *lien* is to be enforced.

A brief history of the legislation and judicial decisions on the subject, may be useful in guiding us to a correct conclusion as to the intention of the legislatnre in substituting chapter 122 in lieu of the preexisting law. At the time the present law took effect, the act of 1839 was in force.

By the first section of that act, it was provided, "That every boat or vessel used in navigating the waters of this state, shall be *liable*, &c." To enforce this liability the third and fourth sections provide for the filing of a complaint, and the issuing of an attachment for the seizure of the boat or vessel. No provision was made by which other claimants under the act could make themselves parties to the proceedings, but each claimant was left to pursue his remedy, without reference to the proceedings that may have been instituted by other claimants. The result was, that claims arising under the act were satisfied in the order in which the attachments were served.

The first section of chapter 122 provides, that "Every ship, boat or vessel used in navigating the waters of this state, *shall be subject to lien thereon*," &c.:

1. For all debts contracted by the master, owner, agent or consignee thereof, on account of supplies furnished, &c., &c.;

2. For all sums due for wharfage or anchorage of such ship, boat or vessel within this state;

3. For all damages arising from the non-performance of any contract of affreightment, &c.;

4. For all damages arising from injuries done to persons or property, &c., when the same shall have occurred through the negligence, &c.

Section 2 directs, that "any person having such claim, &c., may make application to any officer authorized to perform the duties of a justice of the supreme court at chambers, &c., for a warrant *to enforce the lien*," &c.

Section 3 directs the manner in which the application shall be made.

Section 4 authorizes the issuing of a warrant, and the seizure of the vessel, &c., "*to answer all such liens as shall be established against it according to law.*"

Sections 5 and 6 direct the mode of proceeding by the officer charged with the execution of the warrant.

Sections 8 and 9 provide for the publication of a notice for twelve successive weeks, which notice, among other things, shall "require *all persons who claim to have any demand against such ship, boat or vessel*, &c., under the provisions of this chapter, to deliver an account of their respective claims to such officer, within three months from the first publication of the notice, or *that the remedy against such boat or vessel will be forfeited.*"

Section 10 provides, that "any person having any *lien* under the provisions of this chapter, upon the property so seized, may deliver to the said officer an account in writing of his demand, accompanied by such affidavit as is hereinbefore prescribed in relation to the first application for a warrant; *and he shall thereupon be deemed an attaching creditor*, and be entitled to the same benefits, and subject to the same responsibilities, as the claimant at whose instance such warrant originally issued."

Section 11 declares, that "*all liens* under this chapter upon the property so seized, an account of which shall not be presented to the said officer within the time limited in the notice, shall cease."

Sections 12, 13 and 14 provide the mode by which the proceedings against the ship, boat or vessel may be discharged.

Section 12 authorizes the application to be made for such discharge at any time before an order of such sale shall have been made.

Sec. 13 directs a bond to be given, with security, "to the creditors or claimants prosecuting such warrant, in a penalty double the amount of debts or claims sworn to," &c. "conditioned that the obligors therein will pay the amount *of all such claims and demands as shall have been exhibited, which shall be established to have been subsisting liens upon such ship, &c., pursuant to the provisions of this chapter, at the time of exhibiting the same respectively.*"

Sec. 16 authorizes a suit upon the bond so given; and "the attaching creditors respectively shall state in their declaration, their respective demands, averring that the claim therefor *was a subsisting lien* *on such ship, &c., at the time of the exhibition thereof,* as hereinbefore provided," &c.

After providing for the sale of the ship, boat or vessel, the 23d section directs that distribution of the proceeds shall be made "*among the creditors who shall have exhibited their claims as herein provided.*"

Sec. 36 provides, that "no proceedings under this chapter, *to enforce the liens* AUTHORIZED *by its provisions,* shall be had against any vessel which shall have been seized by virtue of process issuing from any court of the United States having admiralty jurisdiction," &c.; "but nothing in this section contained shall be construed to impair the validity of *any liens created* by this chapter, the payment of which shall be decreed in any court in the United States."

These quotations present, very clearly, the difficulties in the way of reconciling the various sections of the statute under consideration. The conflict is so palpable, as to render it quite impossible to harmonize its provisions, and make each section consistent with every other section with which it stands connected.

With respect to the first section, it is identical with the corresponding section of the act of 1839. The phraseology is slightly changed, but the legal sense is the same. By the first section of the act of 1839, every boat or vessel navigating the waters of this state is declared to be *liable*, &c. By the first sec. of chap. 122, such boat or vessel is *subject to a lien*, &c.

In its largest sense, the word *lien* embraces every case in which property is *charged* with the payment of any debt or duty: to be *charged* with the payment of any debt or duty, is equivalent to being *liable* for the payment of any debt or duty. Either form of expression imports a right *in rem.* And it is important to observe, that the instances in which boats or vessels may be seized, are the same under both statutes. No distinction whatever is made between foreign and domestic creditors; nor does the first section of the present law, any more than that of 1839, confine this right to proceed *in rem*, to debts created or liabilities incurred within this state, except in the single instance where the claim is for wharfage or anchorage. The two statutes are also substantially alike in respect to the mode of proceeding to enforce the claims specified in section one.

By the act of 1839, an attachment issued upon the filing of a complaint, verified by affidavit. By the existing law, a warrant issues; both processes, however, perform the same office. It is true that the *warrant* in the second section is "to enforce the lien of such claim or demand, and to collect the amount thereof." This language would seem to imply that a *specific lien* was intended to be created by the first section of the act, and that as a means of enforcing such lien, a warrant issues to seize the ship, boat or vessel. The same inference is deducible from the fourth section, by which the officer charged with the execution of the warrant, is directed to "attach, seize, and safely keep such ship, &c., to answer all such *liens as shall be established against it, according to law.*"

The remaining provisions of the statute of 1846, relative to the mode of executing the warrant; the notice to be given on the return of the same; the proceedings to be had by persons having claims against the ship, boat or vessel under the first section of the act; the manner of procuring the discharge of such ship, boat or vessel; the bond to be given upon such discharge; the remedy and mode of proceedings upon such bond for breach of any of its conditions; the order of sale and mode of conducting the same; and the final distribution of the proceeds;—are a literal copy from the New York statute in relation to "proceedings for the collection of demands against ships and vessels." 2 R. S,. N. Y., tit. 8, p. 404.

That the whole of the New York statute was not intended to be adopted by our legislature, appears very clearly from the provisions of the first and second sections of that statute, which are as follows:

"Sec. 1. Whenever a debt, amounting to fifty dollars or upwards, shall be contracted by the master, owner, agent or consignee of any ship or vessel, *within this state*, for either of the following purposes:

"1. On account of any work done, or materials or articles furnished, *in this state,* for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel;

"2. For such provisions and stores furnished, *within this state,* as may be fit and proper for the use of such vessel at the time the same was furnished;

"3. On account of the wharfage and the expenses of keeping such vessel *in port,* including the expenses incurred in employing persons to watch her;

"Such debt *shall be a lien* upon such ship or vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages."

"Sec. 2. When the ship or vessel shall depart from the port at which she was when such debt was contracted, to some other port within this state, every such debt shall cease to be a lien at the expiration of twelve days after the day of such departure; and in all cases such lien shall cease immediately after the vessel shall have left this state."

The difference between these provisions and those embraced in the first section of chapter 122 of our statute, are striking and very material. That a debt contracted for the purposes specified in the first section of the New York statute, was intended to be a *specific lien*, is quite obvious from the language of that section. It is declared, in express terms, that "such debt *shall be a lien* upon such ship or vessel, and shall be preferred to all other liens thereon, except mariners' wages."

The second section is equally explicit, by declaring the circumstances under which the lien created by the first section shall cease. We have already said that the first section of our statute is the same, in legal effect, with the corresponding section in the act of 1839, and makes ships, boats and vessels navigating the waters of this state, "*subject to a lien*" for the debts specified in that section.

The language of the first section of our act, unlike that in the first section of the New York statute, does not, *necessarily*, import a lien. It is not said that "such debt shall be a lien;" but declares that, for certain debts, every ship &c. "shall be subject to a lien." By the New York law, the lien is created when the debt is contracted; by our law, such a consequence does not, of course, follow, unless it appears from an inspection of the whole act that such was the intention of the legislature.

But the great distinction between the New York and Michigan statutes, consists in this: that by the first section of the New York statute the debt, in order to be a charge upon a ship or vessel, must have been contracted within the state; while the first section of our statute imposes, in *express terms*, no such restriction. If such a restriction was intended, it must be inferred by construing the first section with other parts of the statute.

The reason for confining the lien to domestic debts, and declaring that such lien shall cease when the ship or vessel leaves the state, has its foundation in a wise policy. The legislature of New York were aware, that to continue a lien after the ship or vessel has left their state and entered another sovereignty, would be productive of great mischief. No person exercising ordinary prudence would venture to contract for the purchase of a ship or vessel built in the state of New York, or owned by its citizens, if such ship or vessel, when she crossed the line which divided the jurisdiction of that state from another, continued to be burdened with liens created by the laws of the state where such ship was built, or by whose citizens she may be owned. A citizen of Michigan, in making such a contract, has in view the laws of the state where the contract is made. It would be unreasonable that he should be required to ascertain whether, by the laws of another sovereignty, the ship or vessel is encumbered with liens created by the laws of such sovereignty. He has a right to presume that the state of New York would not give to her local laws, intended for the benefit and protection of her own citizens, an operation beyond the limits of her own territory. That state fulfilled its whole duty to its citizens, when it gave a lien on ships and vessels *within the state*, for a debt contracted *within the state*. If the creditor allows the ship to leave the state, it is but just to citizens of other states, that the rights conferred by the law of the place where the debt was created, should cease.

I have already said that the first section of the existing statute was borrowed from the corresponding section in the act of 1839. That section has received a judicial construction from this court. We held in 1842, that no lien was created under its provisions, until the ship, boat or vessel was actually seized by an attachment. The views expressed in 1842 were re-affirmed in 1849, after the most mature deliberation. Robinson *v.* Steam Boat Red Jacket, Ante 171.

The question then decided is not now open to discussion or review, especially as the opinions we then expressed have been concurred in by the highest courts in several of the states where the same statute exists. The important question decided in 1842 and 1849 was, that the act of 1839 was intended to afford a new and more efficient remedy for the collection of a certain class of debts, than was given at the common law. We repudiated the idea that the benefits secured by that act were intended exclusively for our own citizens; but held that the statute was purely remedial, and that citizens of other states might avail themselves of its provisions, and enforce their claims, whether those claims originated in Michigan or in a sister state.

The counsel, in arguing the case before us, do not pretend to controvert or impugn the correctness of the views we expressed in 1842 and 1849, but contend, very earnestly, that, while those views may be sound when applied to the act of 1839, they are inapplicable to a law essentially different, and which was substituted for that of 1839. It was urged, that while that act conferred no exclusive benefits upon our own citizens, that the law now in force was intended to secure to them rights to the exclusion of citizens of other states.

That it is competent for a legislature to confer upon its own citizens peculiar rights, is not denied. In doing so, however, they are supposed to be controlled by reasons so overwhelming, or views of policy so just, as to commend its action to the approval of the wise and the enlightened.

Is it consistent with justice, that rights secured to our citizens by the act of 1846, should be denied to the citizens of a sister state? Is there any more sacredness attached to a claim which a citizen of Michigan may have, for having supplied a boat with a barrel of flour, than to the claim of a citizen of Buffalo, who has supplied the same boat with a quarter of beef? The moral obligation to pay the claim, is just as binding upon the owners of the boat in the one case as in the other. The nature of this *obligation* remains the same whether it was incurred at Buffalo or Detroit. Why, then, should not their legal rights and remedies be the same in any forum where that obligation is sought to be enforced?

This question admits of but one answer. A liberal and just policy would seem to require that the remedies provided for our citizens, for the vindication of their rights or the redress of their wrongs, should not be denied to the citizens of a sister state, who may appeal to our judicial tribunals for justice. But would the construction contended for by the defendants, confer a benefit upon our citizens? It is contended that the person who furnishes supplies, the mechanic who performs labor, the material-man who provides materials, for any ship, boat or vessel, would have a lien on such ship, boat or vessel. The same section, however, contemplates a lien in favor of those who may be entitled to damages for the non-performance of any contract of affreightment, or of any contract touching the transportation of persons or property; and for all damages arising from injuries done to persons or property by any ship, boat or vessel, where the same shall have occurred through the negligence or misconduct of the master or hands employed thereon.

Contracts of affreightment, and for the transportation of persons and property, are in nine cases out of ten made without the state; and as we cannot give to our statute an extra-territorial operation, it would follow, that the large and important class of cases specified in the third subdivision of section one, would be excluded from the benefits of the statute.

The same remarks will apply to cases arising under the fourth subdivision. If, through negligence, the goods of a merchant, which may include his entire fortune, are lost, ten rods beyond the line which separates our jurisdiction from that of Ohio, he can have no claim to the benefits of the statute. So if, through like negligence, one of our citizens loses a limb, by the explosion of a boiler, he can claim no rights under the statute, if the injury occurred within the jurisdiction of another state.

These are facts which the legislature must be presumed to have known; and however they may have been disposed to draw a line of distinction between our own citizens and the citizens of other states, we are not justified, except the contrary manifestly appears, in supposing that rights were intended to be conferred upon one portion of our citizens which are denied to others. This distinction the legislature have not made in the first section of the act in question. By that section, a remedy is given for the enforcement of rights and the redress of injuries, of which every citizen of our own state, and those of other states, may claim the benefit.

But there is another, and it seems to me almost conclusive view to be taken of the question I am now discussing. The second subdivision of section one is in these words: "For all sums due for wharfage or anchorage of such ship, boat or vessel *within this state.*"

It may be asked with emphasis, whether the restrictive words, "within this state," would not have been found in the other subdivisions of the same section, if the legislature intended to confine the remedy to contracts made or injuries received *within the state*. The fact that these words are to be found in the second subdivision, indicates that they were intentionally omitted in the first, third and fourth subdivisions of the same section. And this inference would be irresistible, if the language of that section was not controlled by other provisions of the act, to which I have adverted, and which I now propose briefly to examine.

The second section authorizes the issuing of a warrant "to enforce the liens," &c. This would imply that the seizure of the vessel, by virtue of the warrant, did not *create the lien*, but that the object of the seizure is to *give effect to an existing lien.* The tenth section is equally explicit. Any person *having a lien* upon the property seized, is to deliver to the officer an account in writing of his demand, duly verified: it is not the delivery of the demand, thus verified, which gives the lien; for by the words of the act, no person is authorized to file his demand, unless he has a *subsisting lien*.

The same inference is to be drawn from section 11, which declares that all *liens* shall cease, an account of which shall not be delivered to the proper officer within a specified time. The condition of the bond given under section 13 is susceptible of but one construction. The obligors therein bind themselves to pay all such demands as shall have been exhibited, and which shall be established to have been *subsisting liens* upon such ship, boat or vessel, "*at the time of exhibiting the same respectively.*" This language is unambiguous, and clearly imports that a lien actually subsisted at the time of exhibiting the claims specified in the first section. Section 36 shows, very conclusively, that the object of the proceedings is not to *create*, but to *enforce liens.*

If any doubt existed as to what the legislature intended, judging of that intention by what appears on the face of the act itself, that doubt must vanish when we come to consider, that in an action upon the bond given under section 13, the attaching creditor must aver that his claim was a *subsisting lien* on the ship, boat or vessel, *at the time the same was exhibited,* as provided by section ten. If the averment is made necessary by the statute, it must be proved on the trial: this the claimant could not do, if, as contended by the plaintiffs, the boat was not subject to a lien when the claim was exhibited. We cannot attribute to the legislature the folly of requiring the plaintiff to aver, and prove a fact, when by the terms of the statute no such fact existed.

Whatever, therefore, may be our views respecting the interpretation to be given to the first section, separately considered, or whatever opinions we may entertain respecting the impolicy of confining the remedy given by the statute to contracts or injuries arising within this state, we are constrained to say, that, construing the first section in connection with the other sections of the same act, a *specific lien* is given by that section, and that the other sections provide a remedy by which it is to be enforced. I have struggled to arrive at a different conclusion, believing, as I do, that a policy more liberal and enlightened towards citizens of other states ought to prevail, and knowing full well that this conclusion will exclude from the benefits of the statute a large class of our own citizens, from rights secured to others.

But the *inferences* to be drawn from a literal interpretation of the first section, must be controlled by the clear and express language to be found in other sections of the same statute, although the policy of the act may to some extent be defeated. It is only when a statute is ambiguous in its terms, that courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the law maker. In the statute now before us, the language admits of but one construction. No doubt can arise as to its meaning. It must therefore be its own interpreter. We are not permitted to look out of, or beyond it, to ascertain whether the legislature may not have intended what, upon the face of the statute, they have failed to express.

Certified accordingly.

FREEMAN v. FREEMAN.

Where in chancery the order for the appearance of a non-resident defendant in a divorce case, was not in compliance with sec. 12, ch. 2, tit. 7, part 2, R. S. 1838, but was the same as in other cases of non-resident defendants, the decree of the chancellor granting a divorce was reversed for want of jurisdiction.

APPEAL from the Court of Chancery, third circuit. A petition for a divorce was filed against a non-resident defendant, under R. S. 1838, and the following order was made for the appearance of the defendant, viz:

"Melancton Freeman, petitioner, v. Rebecca Freeman, respondent.—It satisfactorily appearing to this court that the defendant in this cause, Rebecca Freeman, is not a resident of this state, but that she resides in the city of New York: On motion of Johnson and Martin, solicitors for petitioner, it is ordered, that the said defendant cause her appearance in this cause to be entered within four months from the date of this order, and that, in case of her appearance, she cause her answer to said petition to be filed, and a copy thereof to be served on the petitioner's solicitors within forty days after service of a copy of said petition and notice of this rule, and in default thereof said petition be taken as confessed by said defendant. And it is further ordered, that within twenty days the said petitioner cause a copy of this order to be published in the state paper, and that said publication be continued in said paper at least once a week, for eight weeks in succession, or that he cause a copy of this order to be personally served on said defendant at least twenty days before the time above provided for her appearance."

Which order was published as therein required; and the defendant not appearing, and testimony having been taken in the cause according to the rules and practice of the court, a decree was granted for a divorce from the bonds of matrimony.

The court held: 1. That as the order did not comply with sec. 12, ch. 2, tit. 7, part 2, R. S. 1838, the decree was wholly void for want of jurisdiction in the court. 2. That the order for the appearance of the respondent should have included a notice *of the nature of the petition.*

Campbell, for the appellant.

Lothrop and Duffield, for respondent.

Comstock *v.* Draper.

A. and B. made their promissory note, payable to the order of C., at the Farmers' and Mechanics' Bank at Pontiac, and C. and D. endorsed the note in blank, and it was then discounted by the bank for the makers. Afterwards a judgment was obtained on the note against D., in the name of the bank, and E. was appointed receiver of the bank by the court of chancery. E. took a new joint and several note from C. and D. to himself, in part payment of the judgment, which last note was transferred to defendant after it became due, and the law under which the bank was organized, commonly called the general banking law, was subsequently adjudged to be unconstitutional. *Held*, That the illegality of the original transaction affected the new note, which was void, as there was no new consideration.

Error to Oakland Circuit Court. Charles Draper sued Comstock in the circuit court, and declared in assumpsit on a joint and several promissory note, made by Comstock and Asa B. Hadsell, on the 19th October, 1840, for $70 91, payable to William Draper or order, and endorsed by him to the plaintiff. The defendant put in a plea, stating that Orison Allen and A. S. Allen, on 11th April, 1838, made their promissory note for $100, payable in ninety days to the order of Comstock, the defendant, at the Farmers' and Mechanics' Bank, at Pontiac, which note was endorsed in blank by Comstock and Asa B. Hadsell, and then discounted by the bank for the makers. That after the note became due, a suit was brought by the bank against Hadsell as endorser, and a judgment obtained against him by the bank, on the 15th October, 1839, for $110 29 damages. That on the 19th October, 1840, the defendant and Hadsell gave the note on which the present suit was brought, to William Draper, who was then receiver of the Farmers' and Mechanics' Bank, under an order of the court of chancery, in part payment of the aforesaid judgment. That after the note became due, and on or about the 20th October, 1840, William Draper endorsed it to the plaintiff. That the Farmers' and Mechanics' Bank was organized under an act of the legislature of the state, entitled "An act to organize and regulate banking associations," approved March 17, 1837, and that the bank never had a legal existence. To this plea the plaintiff demurred, and the defendant joined in demurrer; and the demurrer having been sustained by the court below, and judgment rendered for the plaintiff, the defendant sued out a writ of error to this court, where the cause was argued by

Stevens, for the plaintiff, in error.

Draper, in person.

By the court, WING, J. As the case is presented by the pleadings, the defendant in error must be held to stand in the same position with the payee of the note, and hold the note subject to the same defence that could have been made to it in the payee's hands. This results from his having received the note after it was past due. He is affected by all the equities between the original parties, whether he have notice thereof or not. Story on Bills, 197.

It is conceded that the law under which the Farmers' and Mechanics' Bank of Pontiac was organized, was unconstitutional, and therefore the bank had no legal existence. This was fully settled in the case of Green *v.* Graves. In that case, suit was brought by the receiver of the Bank of Niles, on a note given to the bank. The receiver was not permitted to recover: as his principal, or the institution which he represented, could not recover, he could not.

In this case the note was given to William Draper, and was made payable to him or his order, but it was in fact made to him in his representative capacity, because he was receiver, and in payment or discharge of a debt due to the so-called Farmers' and Mechanics' Bank of Pontiac, and for no other consideration: he appears not to have had any interest in the note, except in his character of receiver. He could not have owned the judgment, for, being in the name of the bank, there were no means of making a legal assignment: whatever may have been the force and effect of the judgment, standing in the name of the bank, there was no legal person with whom William Draper could contract for it. Then the consideration of the note being the judgment or the debt evidenced by it, could William Draper, as receiver—the representative of the bank—make a more binding contract with the debtors of the bank, than his principal could make? I do not now speak of the consideration of the note; I simply put the matter upon the basis of power, or want of power in the receiver to do what the bank could not do; and it appears to me the answer must be in the negative.

That the original note was void, because it grew out of a transaction with an illegal bank, and because the consideration of the note was illegal, cannot be disputed, since the late decisions of this court, and particularly the decision in the case of Hart *v.* The Michigan State Bank.* The original parties were *particeps criminis* and *in pari delicto.* If the suit on the original note had been defended on the ground that the consideration of it was entirely an illegal currency, and paid in furtherance of an illegal object, no judgment could have been recovered upon it; at the least, as the law is now understood to be, and as it is stated in the case cited, and also in the cases of the State of Michigan *v.* How *et al.*, and McReynolds *v.* Goddard *et al.* *Vide* Appendix. It was held in those cases, that *ex turpi contractu, non oritur actio.*

But it is insisted that the judgment was valid, and could not be impeached, and therefore constituted a good and legal consideration for the note; that no defence can be made to this note, which could not have been made to a suit on the judgment.

It is not quite easy to understand this doctrine as applied to this case, for it must be admitted that no suit could have been brought upon the judgment. There was not and could not be any person competent to sue. As to the general rule in relation to the force and effect of a valid judgment, there can be no doubt; and it perhaps may be conceded, that if a judgment should be recovered upon a note to which fraud might have been a defence, and the judgment debtor, with full knowledge of the fraud, should give a note for the amount of the judgment, he could not contest the note upon any grounds; at all events, not upon the ground of fraud, merely personal to himself, and in which the public are not interested.

But the question now presented is one involving the *illegality* of the original note. It is not held to be void for the good of the makers, or on account of any merit in them, but on the ground of public policy, to protect the public against the violation of a positive statute.

It is a well settled doctrine in the English and American books, that an illegal transaction cannot constitute a good consideration for a promise. If the connection between the original illegal transaction and the new promise can be traced, if the latter is connected with and grows out of the former, no matter how many times and in how many different forms it may be renewed; it cannot form the basis of a recovery, for repeating a void promise cannot give it validity.

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* This case is not in the possession of the reporter. It will be published in the next volume.

In this case, no new element has entered into the new promise. The parties are substantially, and in law, the same. The consideration is the same, and the parties all have actual or constructive notice. The original unsoundness of the debt has flowed down to and is incorporated into the new promise. But it may be said the stream has been purified in its passage; that the judgment has purged the original taint, and the note is no longer connected with and does not grow out of the original illegal contract, but grows out of the judgment. Is this true? The judgment can scarcely be said to have purified the stream: it may have dammed it, and stopped the continuous flow of the current, for the period the judgment existed as a judgment; but when the judgment was discharged, the dam was removed, the impurities of the fountain again flow on, and are carried along by the current, and mingle with the new promise.

If we give all the effect that can be claimed for a judgment, and if we assume that it could not have been impeached by any proceeding at law or in equity; that the position of the plaintiffs in the judgment was impregnable so long as they maintained it, and their judgment was kept in full force; yet if their position was voluntarily surrendered by a discharge of the judgment, and their rights were deprived of the protection which the law had given to them, and a new note was taken for the original, or a part of the original indebtedness, without any new consideration, can they complain that it should be held subject to the same defence which might have been made to the original note? If the judgment could be said to have imparted to the debt any support, did it not pass away with that by which it was sustained? I think it did. Considerations and principles of a higher character than such as would be applicable to the case of a private fraud (cited above) must prevail.

I was somewhat puzzled, at first, to discover how the effect claimed for the judgment was to be obviated; but on looking into the decisions of the King's Bench, I think it will be found that no insuperable barrier is presented by the judgment.

In the case of Ribbans v. Crickett, 1 Bos. and Pul. 264, plaintiff furnished victuals to voters, which was unlawful. On being sued, defendant paid money into court, but the court would not allow it to be applied in payment of the illegal contract. Here the payment of money into court was an admission of every cause of action, either well or ill pleaded, which could be the subject matter of a promise. This was a subsequent promise in effect, and of the most binding character; for paying money into court enures to the benefit of the plaintiff, even in cases where there is no consideration.

In Aubert v. Maze, 2 Bos. and Pul. 371, plaintiff had paid the difference in certain unlawful insurances, after the transaction was passed, and sued for the balances, and though arbitrators awarded a sum due, the court set aside the award. Lord Eldon held there was no difference between paying the money generally in the adventure, and paying at the express request of the defendant. That being one remove from the illegal transaction, does not alter its nature; it is still connected with it.

In the case of George v. Stanley, 4 Taunton 683, defendaut lost money at play, and gave notes for it, which were passed to the plaintiff by the payee. They fell due, and he gave the plaintiff other notes in lieu thereof, and being unable to meet these, he confessed a judgment, execution was issued, and the money was made. After all this, the court suffered an issue to be made, to see if the plaintiff could be implicated or charged with notice.

In De Begnis v. Armistead, 10 Bingham 107, plaintiff and defendant carried on a theatre in London, which was unlicensed: plaintiff was to pay certain matters, and defendant certain other specific expenses. Plaintiff paid, at the request of defendant, several sums for him. After the whole transaction was ended, a settlement was made, and defendant gave his acceptance for the sum due. Held, that as the debt originated in illegality, the subsequent settlement and acceptance were illegal and void.

These cases show that courts have gone far to sustain a defence to an illegal contract, or a contract remotely connected with the illegality, if it spring from or is based upon it. A plaintiff is not permitted to get into court through an illegal contract. The court will not in any way aid a guilty party. The contract is still executory.

If I am correct in these views, the conclusion follows, that plaintiff in error should have judgment upon the demurrer.

Judgment reversed.

CASES
DETERMINED IN THE SUPREME COURT
OF THE
STATE OF MICHIGAN,
AT JACKSON.

JULY TERM, 1850.

PRESENT:

HON. CHARLES W. WHIPPLE, C. J.
HON. WARNER WING,
HON. GEORGE MILES,
HON. SANFORD M. GREEN,
HON. EDWARD MUNDY, } JUSTICES.

HARRINGTON *v.* WORDEN.

VARIANCE.—In an action on a warranty of a span of horses, the declaration stated the consideration to be a yoke of oxen of the value of $80, and a note for $20, and on the trial it appeared the note was for $10 only. The variance was held to be fatal.

Had the averment been, the sale was for a valuable consideration, to wit: for one yoke of oxen and a note for $20, it would not have been necessary to prove with precision the items of the specification.

ERROR to Oakland Circuit Court.

Worden sued Harrington in the circuit court on a warranty of a span of mares. The declaration stated, that in consideration Worden would, at the special instance and request of Harrington, buy of him a certain span of mares, Harrington undertook and promised that the mares were sound, except in one fore foot, &c., and that Worden, confiding in the promise, bought the mares, and gave in exchange therefor one yoke of cattle of the value of $80, and a note for $20, &c. Defendant plead the general issue. On the trial the plaintiff proved a breach of the warranty, and that he gave for the mares a yoke of oxen and a note for *ten dollars only*. Defendant asked the court to charge the jury, that as the plaintiff had failed to prove the value of the oxen as alleged in the declaration, he could not recover. The court stated to the jury it was not necessary to prove the value of the oxen. Defendant then requested the court to charge the jury, that, inasmuch as the plaintiff had not proved the consideration as stated in the declaration, they must find a verdict for defendant, which the court refused to do, and the defendant excepted. A verdict was returned for the plaintiff, and judgment having been rendered thereon against defendant, he brought a writ of error.

C. Draper, for the plaintiff in error.

Manning, for the defendant in error.

By the court, WING, J. The note proved to have been delivered to defendant was a ten dollar note. It is urged, the averment of the oxen and the note being given in exchange, is an immaterial averment. The test of the truth of this position, is, whether the action can be sustained without it. If we strike this out, there remains no consideration stated on the record for defendant's undertaking, and the declaration would be bad, as no binding contract would be stated. It is said, the consideration stated that the plaintiff, at the special instance and request of the defendant, would buy the mares, is a sufficient consideration for the promise of the defendant; but suppose the plaintiff had failed to buy the mares as he had agreed to do, and the defendant had brought an action to enforce it, what would be the measure of damages? Nothing was agreed to be given for the mares; all that the defendant in that case would have agreed to do, was simply to buy; surely, it would be a void contract, and the court could not enforce it.

But assuming, as the parties seem to have assumed, that the consideration for the undertaking of the defendant was the oxen and a twenty dollar note, we must hold that the averment is material for the reason we have given; and the plaintiff is bound to prove it as stated. Issue is taken upon it by the plea. Great accuracy is required in the statement of the consideration, which in an action of assumpsit forms the basis of the contract, and if any error is made in the description of it, the consequence is, the whole contract is misdescribed. Chitty's Pl. 326. If it is true, as argued by defendant's counsel, that it is quite immaterial what the value of the oxen was, as the defendant was to receive them; and as the consideration in this case would not furnish the rule of damages, still the description of the note would be material. The note forms a part of the entire consideration. The ten dollar note proved is not the twenty dollar note stated in the declaration. The question is not as to its value; it is stated to have been a note of twenty dollars, *i. e.* a note for the payment of twenty dollars. Then if, as shown by the proof, it was in fact a note of ten dollars, it is no more the thing described than a boot would have been: consequently, the consideration of the promise was misdescribed. It is well settled that descriptive averments must be proved with a degree of strictness extending (as Mr. Greenleaf says) in some cases even to a literal precision. No allegation descriptive of that which is legally essential to the claim or charge can ever be rejected. 1 Starkie's Ev. 373. See authorities cited in 1 Greenleaf's Ev., sec. 56, p. 68.

The description given of the note in the declaration is matter of substance: for it goes to the identity of the note. The consideration might have been sufficiently well set forth by a less particular description of it. In that case it would not have been necessary to prove the precise amount of the note; but the particular statement of the amount has become material in this case by being inseparably connected with the essential allegations. Had the averment been, that the sale was for a valuable consideration, to wit: for one yoke of oxen and a note for twenty dollars, it would not have been necessary to prove with precision the items of the specification. But where, as in this case, the action is for a breach of warranty upon the sale of personal chattels, and the plaintiff has set forth the price paid for the goods without a *videlicit*, he is bound to prove it as alleged, it being rendered material by the form of allegation. Durston *v.* Tuthan, cited in 3 T. R. 67; Symmons *v.* Knox, 3 T. R. 65; Arnfield *v.* Bate, 3 Maule & Sel. 173; Stephen's Pl. 419, 420; 1 Chitty's Pl. 348, 6th edit.

The cases in which averments were considered immaterial, cited from Cowen & Hill's Notes 514, do not apply to this case.

We are, therefore, of opinion that the judgment of the circuit court must be reversed, and that the case must be remanded for a new trial.

Judgment reversed, &c,

AUSTIN *v.* GRANT ET AL.

A bill filed to foreclose a mortgage stated that the defendant, being indebted to complainant in the sum of $750, confessed five several judgments for $150 each, before a justice of the peace—setting out the judgments as they were entered on the justice's docket—and that the mortgage was given to secure the payment of the judgments in one year. Defendant, by his answer, to which a replication was filed, admitted the judgments and mortgage, but denied the indebtedness, and insisted the judgments were void. The cause was heard on the pleadings, and the court, being of opinion the judgments confessed before the justice were void for not complying with the statute, dismissed the bill with costs.

APPEAL by Grant from the Court of Chancery.

Davidson and Holbrook, for the appellee.

Stevens, for the appellant.

By the court, MUNDY, J. The bill alleges that the defendant Grant, being indebted to the complainant in the sum of seven hundred and fifty dollars, to secure the payment thereof with interest, confessed before a justice of the peace, five several judgments, each for one hundred and fifty dollars, with costs, setting out such judgments as they were entered upon the justice's docket. It then alleges that Grant, being so indebted, and having consented that said judgments be entered therefor, did on the 25th day of April, 1840, *in order to secure the payment of each and every of said judgments*, in one year from the date thereof, execute and deliver the mortgage. In setting out the mortgage, it is shown that it was upon the condition that, if Grant should pay to the complainant the sum of seven hundred and fifty dollars, with lawful interest thereon, in one year from the date of the mortgage, according to the condition of five judgments, bearing even date therewith, of one hundred and fifty dollars each, rendered by Nathan S. Philbrick, a justice of the peace of Oakland county, by Grant to the complainant, as a collateral security, the mortgage should cease and be void; but in case of non-payment of the said judgments, with the interest thereon, the mortgagee was authorized to sell the premises, as under the usual power contained in mortgages.

The entry of each of the judgments is as follows:

"Julius A. Austin *v.* Charles Grant.—Oakland county, April 25, 1840. In justice's court, before N. S. Philbrick, justice of the peace in the county aforesaid. Defendant confessed judgment in favor of the above plaintiff, in writing, for the sum of one hundred and fifty dollars, and against defendant in the above entitled suit. Execution to stay one year from date: April 25, 1840. Judgment entered up accordingly for the same.

Damages, . .	$150 00
Court, for judgment,	75
	$150 75"

The defendants, in their answer, deny the indebtedness of Grant, as stated in the bill, and set out various facts going to show usury in the loan of a less sum of money by Grant of the complainant. They admit that Grant, on the 25th day of April, 1840, made and delivered to the complainant a mortgage for the sum of seven hundred and fifty dollars and interest, payable in one year, *as is alleged in the bill of complaint;* the acknowledgment and recording of the mortgage, as stated in the bill, and that it was upon the conditions therein mentioned. They admit that the mortgage was executed and delivered after the confession and entry of the judgments set forth in the bill of complaint: that Philbrick, at the time of the entry of the judgments, was a justice of the peace of Oakland county; but they say that they were not entered according to the provisions of the statute, and are null and void; and they deny that there is anything due upon the judgments, to Austin.

The answer was without oath, that being waived. There was a general replication, but no proofs having been taken, the cause was heard upon the pleadings.

It is obvious that the judgments were not rendered or entered conformably to the Revised Statutes of 1838, and are therefore void. 1 Doug. Mich. R. 197. The indebtedness of Grant, as stated in the bill, being denied, our only inquiry is, as to the effect of such admissions or statements in the answer as are responsive to the bill.

The bill, after stating the indebtedness of Grant to the complainant, and the confession and entry of the judgments, alleges that Grant, being so indebted to the complainant as aforesaid, and having consented that the judgments be entered therefor, in favor of the complainant, in order to secure to the complainant *the payment of each and every of the judgments, in one year from the date thereof*, executed and delivered the mortgage. Responsive to this is the admission of the defendants, that Grant did execute and deliver the mortgage for the amount of seven hundred and fifty dollars, and interest, payable in one year, as is alleged in the bill.

The allegation in the bill is, that the mortgage was made to secure the payment of the judgments; and to this effect is the admission of the defendants.

It is insisted on the part of the defendants, that the indebtedness of Grant being denied, and the judgments, to secure the payment of which the mortgage was given, being void, that there is nothing in the case, as it is presented to the court, upon which the mortgage as a security can be sustained, or to authorize its foreclosure.

It is said in reply, that it is unnecessary to prove the indebtedness: that it is enough to prove the execution of the mortgage, or, which is the same thing, that its execution when admitted, is sufficient. This proposition is not sustained by the case referred to in 2 Sandford's R. 364. The point decided in that case, was, that the allegation of indebtedness was immaterial and need not be proved, but that the complainant would be entitled to a decree on the statement of the execution of the bond and mortgage; the same having been proved, as appears by the case.

If the judgments when the mortgage was executed had been valid, affording the evidence of an existing indebtedness, the admission of the defendants that the mortgage was made to secure their payment, connected with the subsequent admission responsive to another allegation in the bill, that the mortgage was executed after the confession of the judgments mentioned and set forth in the bill, would be enough to authorize a decree. Such a case would be analogous to the one just referred to. Nor does the proposition of counsel derive any support from the case referred to in 2 Sanford's R. 630. It was decided in that case, that where a mortgage was executed, as appeared by its own terms, to secure sundry liabilities incurred for the accommodation of the mortgagor, and it recited the execution of his bond of the same date and tenor with the mortgage, but no such bond was ever delivered, that the mortgage was nevertheless valid. The vice chancellor, upon this point, said: "It is next objected, that, as the bond recited in the mortgage was never delivered to Berrien, the mortgage was not valid in its inception, and never had a legal existence. That there is no mortgage debt to sustain the mortgage. The testimony shows that there never was any bond executed. The recital in the mortgage, mentioning a contemporaneous bond of the same date and tenor, is, therefore, erroneous. The mortgage was nevertheless delivered, and it aimed to secure liabilities which were in no manner dependent upon the bond recited, or upon any bond."

So that in this case the mortgage having been given to secure the mortgagee against certain liabilities which he had incurred on behalf of the mortgagor, there was something to sustain it, and for which, as a security, the mortgagee had a right to resort to the mortgage.

Suppose the bill of complainant had omitted the preliminary statement of indebtedness—and this it might well have done, as such statement is an immaterial one—and had averred, that on the 25th day of April, 1840, the defendant Grant confessed before a justice the judgments, setting them out, as is done in the present bill: that Grant afterwards executed and delivered the mortgage to secure the payment of the judgments, could it be said (the judgments being void) that the mortgage could be of any effect as a security? I think not; and yet this is the very case presented here by the pleadings. The judgments being void, they afforded no evidence of indebtedness—there was nothing due upon them—there was no money to be paid according to their condition, as it is expressed in the condition of the mortgage deed—and there was no indebtedness, for the non-payment of which the mortgage could be foreclosed.

The decree of the court of chancery must be reversed, and a decree entered in this court that the complainant's bill be dismissed with costs.

Decree reversed, and bill dismissed with costs.

CASES
DETERMINED IN THE SUPREME COURT
OF THE
STATE OF MICHIGAN,
AT PONTIAC.

OCTOBER TERM, 1850.

PRESENT:

HON. CHARLES W. WHIPPLE, C. J.
HON. WARNER WING,
HON. GEORGE MILES,
HON. SANFORD M. GREEN,
HON. EDWARD MUNDY, } JUSTICES.

SMITH v. VILLAGE OF ADRIAN.

Where, in declaring for a penalty given by ch. 41, R. S., for selling spirituous liquor without a license, the plaintiff adopts the form of declaration given by sec. 32, he cannot be required, on the trial, to elect the penalty or penalties he seeks to recover.

Where S. and M. are engaged as partners in keeping a recess, and selling liquor without a license, the selling of liquor by M. is the act of both, and may be given in evidence against S., in an action against him alone for the penalty.

To recover the penalty given by sec. 1, ch. 41, R. S., for selling liquor without a license, it is not necessary for plaintiff to show defendant assumed to act as tavern keeper or common victualler.

In a suit by a corporation, created under the laws of the state, it need not prove its corporate existence under the general issue, unless defendant has given notice, with his plea, that plaintiff is not a corporation. R. S., ch. 116, sec. 6. It is otherwise at common law.

The charter and by-laws of municipal corporations are subject to general legislation.

In an action for the penalty given by statute for selling liquor without a license, plaintiff need not prove defendant had no license, which will be taken to be true, unless disproved by defendant. Neither will the plaintiff be required to

show the question of license or no license was submitted to the people at the preceding charter or township election, in pursuance of ch. 41, R. S.

Whether the proviso of sec. 18, ch. 41, R. S., is void—*query*. If it be, the other provisions of the chapter are valid and in force, and it is not a sound objection to the validity of the law, that it prohibits the sale of spirituous liquors without a license, and no license can be obtained after a vote of no license.

CASE reserved from Lenawee Circuit Court.

Morey, for plaintiff, in error.

Baker and Millerd, for defendants, in error.

By the court, WING, J. This suit was commenced before a justice of the peace, to recover a penalty alleged to have been incurred by William Smith, under the provisions of chapter 41, R. S. The plaintiffs declared in the form prescribed by sec. 32, claiming one hundred dollars for certain penalties and forfeitures, which Smith had incurred, and was justly liable to pay, by reason that he did, on the 20th day of March, 1849, and at divers times between that day and the 18th day of April, in said year, at the village of Adrian, in the county of Lenawee, do and commit certain acts in violation of the laws of the state, touching the sale of wine and spirituous liquors, &c.

The defendant plead, in the form prescribed by the same section, that he was not indebted to the plaintiffs as above alleged. After hearing the case, the justice rendered judgment against the defendant for the amount claimed, and costs. The cause was appealed to the county court for the county of Lenawee, and again tried, before a jury, and the jury not agreeing, and being discharged, the parties submitted the cause to the decision of the court, upon the pleadings and proofs submitted to the jury, and the county court also rendered judgment against the defendant for the sum claimed, and costs. On the trial, the defendant's counsel took exceptions to the ruling of the judge, and the case was removed to the circuit court by certiorari, and reserved by the circuit judge for the opinion of this court, on the questions of law arising in the case.

There are a number of points made, in which error in the ruling of the county court is alleged:

1. It is alleged the court erred in refusing to compel the plaintiffs to elect for what penalty or penalties they sought to recover,—a motion

being made to that effect by the defendant, after the jury was sworn and the plaintiffs had opened their cause. We think there was no error in the judge refusing the order sought by this motion. It is manifest, from the concluding part of the section prescribing the form of the declaration, that it was intended by the legislature that the plaintiff should have great latitude in making out his case, and that neither plaintiff or defendant should be tied up to any specification. There is nothing in the act indicating an intention that any further specification should be given than was provided for in the form of declaration. Experience had shown that in this class of cases it was extremely difficult to prove a violation of the license law: and for this reason, doubtless, the legislature gave the form of declaration, and added, "under such declaration, evidence may be given of any violation of any provision or provisions of this chapter."

2. It is insisted that the court erred in permitting the acts of Smith & Manning, and the acts of Manning alone, to be given in evidence.

It was proved that Smith and Manning were engaged as partners in keeping a recess in the Franklin House, in the village of Adrian. The sale of liquor by both of these persons, or by Manning, was the act of Smith—he participated in the profits—the act of one was the act of the other; and either of them might have been prosecuted under the law. It was, therefore, competent to receive the evidence to which objection was made.

The general principle in relation to crimes, torts and misdemeanors, is, that all persons who participate in the act done are severally liable, if the offence was several or could be committed by one. The defendant in this case could not object that Manning was not joined; if he could, he could only have done so by a plea in abatement. 10 John. Rep. 247; 1 McCord 273; Wharton's Am. Crim. Law 518; 4 Mass. 431. But in such a case as this, where two were interested in the sales and managed the recess, it is probable that but one satisfaction could be had. See 4 Mass. 431; 1 Denio 540.

3. That a recovery could not be had under the first section, as there was no evidence defendant assumed to act as an innholder or common victualler.

We think it was not necessary, to sustain the action under the first section, to prove that the defendant had acted as an innholder, or tavern keeper, or common victualler. The action was sustained under the first section, by proving that the defendant was a seller of wine, brandy, rum or other spirituous liquors, to be used in or about the house.

We think the proof would have sustained an action under either of the first three sections.

4. That there was no proof of the corporate existence of the plaintiffs.

This is not necessary where the plea is in effect a plea of the general issue. By this plea the right of plaintiffs to sue is conceded. At common law it would have been otherwise. The statute provides, that "in suits brought by a corporation created by or under any statute of this state, it shall not be necessary to prove on the trial of the cause the existence of the corporation, unless the defendant shall have pleaded in abatement, or given notice under his plea, that the plaintiffs are not a corporation," &c. R. S., ch. 116, sec. 6.

In New York they have a similar statute. See the case of The Methodist Episcopal Church *v.* Tryon, 1 Denio 451. If it were necessary to prove the existence of the plaintiffs as a corporation, it is shown by the act of incorporation, and the acts amendatory thereto. Sess. L. 1841, p. 66, secs. 1, 2, 3.

5. That no recovery can be had on the part of the corporation for a penalty, except by virtue of some by-law thereof. And no proof was given of the existence of any by-law in regard to the sale of spirituous liquor.

The provisions of the act incorporating the village of Adrian, and the acts amendatory thereto, and the by-laws, so far as they relate to the power of licensing, are subject to the provisions of chapter 41. The legislature have the right to legislate upon that subject, as well for the village of Adrian as any or all of the towns in this state. This power was not divested by the charter of the village or the laws amendatory thereto. It is a political corporation, and subject to general legislation. This subject is fully discussed and settled in the case of The People *v.* Morris, 13 Wendell 325. The general law does not exempt any village or city from its operation; on the contrary, it is made expressly applicable to them. See sections 18 and 31.

The objection made would seem to embrace the idea that the corporation could not prosecute for any penalty for which provision was not made by the charter and its amendments, or the by-laws under them; but we see no valid objection to a suit under the general law in the name of the corporation. The prosecution is not for their benefit. It was competent for the legislature to direct in what name suits might be brought in cities and villages, and in what name in towns.

6. That there was no evidence the question of license or no license was submitted to the people at the preceding charter election, without which a recovery could not be had. And the onus of proving defendant had no license was on the plaintiffs.

It was not incumbent upon the plaintiffs to prove that the question of license or no license had been submitted to the people at their last charter election, or that defendant had no license. Before any person is authorized to sell liquors under twenty-eight gallons, he must have a license: and provision is made for granting licenses by town, city and village authorities, but these authorities are not empowered to grant licenses, "unless a majority of the qualified voters of the city, village or town, as it may be, shall have voted at the next preceding township or charter election therein in favor of the granting of such licenses." The penalty attaches to a sale of liquors without a license. If it was proven that the defendant had sold liquors and it appeared that he had a license, then the question would arise as to the vote of the town or village. But in no case can an individual sell by retail without a license, and we think the burthen of proving the defendant had no license was not thrown upon the plaintiffs. They had only to prove a sale of liquor, and the defendant was bound to protect himself by showing that he had a license. It is true, the complaint involves the charge that defendant has violated the law in selling without a license; but this is a negative averment, and Mr. Greenleaf, in his Treatise on Evidence, vol. 1, sec. 79, states the rule to be, that "when the subject matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party;" and he adds, "such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor: as for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience: whereas, if proof of the negative were required, the inconvenience would be very great." See English and American authorities cited.

He states the same principle in his second volume, sec. 283. But if the charge was a *criminal* neglect of duty, whether official or otherwise, or fraud, &c., the party making the allegation must prove it. 1 Greenl. Ev., sec. 80. The rule stated by Greenleaf and supported by numerous authorities in the English books, is adopted in New York. The case of Potter *v.* Deyo, 19 Wendell 361, is in point. In the case of The Commonwealth *v.* Thurlow, 24 Pickering 374, the court adopted a contrary rule, after arguing the question without citing any authorities. They say they do not intend to decide the general question, upon whom the burden of proof lies in this class of cases. The chief justice says, cases may be affected by special circumstances; and he adds: "In the present case, we think the prosecutor is bound to produce *prima facie* evidence that the defendant was not licensed." We will add, the English rule was adopted in the courts of this state many years since.

7. That the whole of chapter 41 is unconstitutional and void, because it is not complete and positive in itself, but depends upon other bodies than the legislature to give it effect; and that there is no law in force imposing a penalty for selling liquor without a license.

We are unable to perceive how these questions arise, or can be decided on this record, and for the purpose of a decision of this case they can have no bearing. For if it be decided that the proviso to the 18th section is unconstitutional, and therefore void, as well as the provision providing for the disposition of the penalty when collected, still the balance of the law may be valid, and if so, it contains an express prohibition against selling without a license, and a remedy for its violation. It furnishes no sound objection to the validity of the law, that it prohibits a sale of spirits without a license, and that no license could be obtained after a vote of no license, for this would assume that it was a matter of common right to sell in quantities less than twenty-eight gallons.

By the case as presented, it does not appear but that the village may have voted to grant licenses, and the defendant had failed to obtain one. It never has been the law of this state that every man might retail spirituous liquors without a license. The defendant seems to admit that the power to judge as to who were proper persons to receive a license, should be vested by law in some body of men, that this branch of business may be under proper regulations, with a view to the peace and good order of society. Then, suppose the case of an individual who for good reasons, such as intemperate habits or any other sufficient cause, was refused a license by the proper board; and the further fact that the board had full power to grant a licence in a proper case; could he protect himself under the law? He surely could not. From the record we are unable to say that this may not be the position of the defendant.

But without proceeding further with this argument, we repeat our conviction, that a case is not presented which makes it necessary or proper for us to decide the constitutional question urged by defendant's counsel; for if the proviso in the 18th section is void (as to which we do not decide) we have no doubt the other portions of the law which bear on the defendant in this case are valid and in full force, and he has shown no good reason why he should be exempt from the penalties consequent upon its violation.

We are therefore of opinion that the judgment of the county court should be affirmed.

Certified accordingly.

HERRING v. HOCK AND HOCK.

The verdict of a jury in the county court is not conclusive as to the facts of the case, on certiorari to the circuit court.

The judgment of a county court is to be reviewed on its merits. The verdict of a jury in that court should not be disturbed for slight causes; but where it is manifestly unsupported by evidence, the judgment should be reversed.

On reversing the judgment of a county court, the circuit court may, in its discretion, award a new trial under the act. Sess. L. 1849, p. 290.

ERROR to Hillsdale Circuit Court.

Howell, for plaintiff in error.

Hinman, for defendants in error.

By the court, MUNDY, J. The plaintiff brought an action of trespass, before a justice of the peace of Hillsdale county, against the defendants, for taking and carrying away a quantity of lumber. Judgment was rendered by the justice for the plaintiff. From this judgment the defendants appealed to the county court of Hillsdale county.

Upon the trial of the cause in that court, the jury gave a verdict for the plaintiff for $13, for which sum, with costs, judgment was rendered. From the county court the cause was removed by certiorari into the circuit court for Hillsdale county, where the judgment of the county court was reversed, and it is now here upon writ of error, to be disposed of by this court.

It is assigned for error, that the circuit court erred in reversing the judgment of the county court rendered upon the verdict of the jury: that the verdict of the jury was conclusive upon the facts submitted to them: and, further, that such verdict, and the judgment thereon, were in accordance with the law and the facts of the case.

It will not be denied that it was the appropriate duty of the jury to pass upon the testimony, and, having ascertained the facts, to find a verdict accordingly, and that such verdict, and the judgment thereon, should not for slight causes be disturbed by the appellate court; but there can be no doubt of the power of the circuit court to review in a civil case a judgment of the county court upon its merits, and, when the verdict upon which it was rendered is manifestly unsupported by the evidence, to reverse such judgment. R. S. 387, sec. 54.

It is proper to remark, that the judgment of the circuit court was rendered before the act of 1849 took effect, which authorized the circuit court, upon reversal of a judgment, to remand the cause to the county court for a new trial. If this act had been in force when the judgment of the circuit court was rendered, that court might, in its discretion, have awarded a new trial. As it was, all that the circuit court could do, if satisfied that the verdict was wrong, was to reverse the judgment, leaving it to the plaintiff to bring a new action, if he should think proper so to do.

We are satisfied, from a review of the testimony, with the judgment of the circuit court.

The defendants held the note of the plaintiff for fifty dollars, payable to H. Myers, or bearer, in lumber, at his steam saw mill in Allen, within one year from its date, upon ten days' notice, The note was dated January 5, 1848. On the 29th or 30th of December, 1848, one of the defendants gave notice to the plaintiff, who said to him, that if he would come in about ten days the lumber would be ready for him. By the testimony of H. Montgomery, he, at the request of the plaintiff, about the last of December, 1848, or the 1st of Januaay, 1849, notified the defendants that the lumber was ready for them; that the price of the first quality was $8, a whole stock $7, and poorer $6; and showed them a pile of lumber that had been sawed for them.

On the 10th of January, one Gregory, who was in the employment of the plaintiff, delivered to Henry Hock one thousand feet, which was taken away, and of this, Gregory the same day informed the plaintiff: and in the afternoon of the same day, the plaintiff measured and delivered to the defendants sixteen hundred feet more.

After this last quantity had been loaded on the defendant's sleighs, and driven some ten rods, the plaintiff asked to have the amount endorsed on the note. Henry Hock said they had not the note with them. The plaintiff then asked for a receipt to apply on the note, and told the defendants that they could not have the lumber unless it was endorsed on the note, receipted or paid for; and the defendants drove off with the lumber. There was some conversation about the price of the lumber. The plaintiff said he would sell no more good lumber for less than $8. The defendants said they could get good lumber at Jonesville or Hillsdale for $6 or $6 50. The plaintiff said the price was $8, at which price they might take it or leave it.

These facts clearly show a transfer of property in the lumber. There was not only a sale and delivery, but payment also. It was undoubtedly the understanding of the parties, at the time of the delivery of the lumber;—and the measurement by the plaintiff, and the loading by the defendants upon their sleighs, constituted an actual delivery;—that it was delivered in part payment of the note.

In fair dealing, the defendants should have given the receipt asked for; but after the delivery of the lumber in part payment of plaintiff's note held by the defendants, the property in the lumber was changed, and the defendants were not wrong doers in keeping possession of it. The receipt would have been evidence, and nothing more, of the delivery of the lumber in part payment of the note; and of this fact, as appears from the testimony upon the trial, the plaintiff had already abundant evidence within his reach.

The judgment of the circuit court must be affirmed, with costs.

Judgment affirmed.

PERKINS v. SUPERINTENDENTS OF THE POOR OF LAPEER COUNTY.

A certiorari lies to the county court to review a judgment of that court on proceedings instituted under ch. 42, R. S., as the cause cannot be carried to the circuit court of the county for review, under ch. 92, R. S.

MOTION to dismiss certiorari.

Stevens, for the motion.

Goodrich, contra.

By the court, WHIPPLE, C. J. Proceedings in this cause were instituted against the plaintiff in error, under the provisions of ch. 42, R. S. The respondent having recognized to appear in the circuit court for the county of Lapeer, the cause was subsequently transferred to the county court, where a trial was had and a judgment rendered, to reverse which, the writ of certiorari in this cause is prosecuted. A motion is now made to dismiss, upon the sole ground that this court has no jurisdiction of the cause. It is urged by the defendants in error, that the judgment below must be first reviewed by the circuit court by certiorari, under the general provisions of the Revised Statutes which authorize that tribunal to review all judgments of the county court. The ground assumed by the defendants must be esteemed conclusive, unless it is clear that the judgment authorized to be rendered by the provisions of chap. 42 is such an one as to make it impracticable for the respondent to avail himself of the remedy which chap. 92, R. S., furnishes to parties aggrieved by the judgment of the county court.

It is to be noticed, that the proceedings against the respondent were special, and the form of the judgment upon conviction peculiar. The respondent, upon conviction, is to be adjudged the father of the child, and to stand chargeable with its maintenance.

It is difficult to conceive how the respondent could have availed himself of the general provisions which prescribe the mode of reviewing a judgment of the county court by the circuit. Section 48 of chapter 92, R. S. directs a bond to be given in double the amount of debt, damages and costs that may be awarded against the appellant. It is quite clear, then, that the judgment, to be reviewed by certiorari, must be one for debt or damages. The proceeding under chapter 42 contemplates, as I have shown, no such judgment, and the respondent could not, therefore, avail himself of the provisions of chapter 92 to have the judgment of the county court reviewed. The remedy by certiorari authorized by that chapter, applies solely to judgments rendered by that tribunal in the ordinary exercise of its original and appellate jurisdiction, and not to judgments rendered by virtue of the special proceedings authorized by chapter 42.

There being, then, no other mode of reviewing the judgment before us, the respondent had the right to avail himself of the general superintending power which this court possesses over all inferior jurisdictions, and to have the proceedings of the court below reviewed by this court in the mode authorized by the common law.

Motion denied.

APPENDIX.

Moses *v.* Steam Boat Missouri.

By the act to provide for the collection of demands against boats and vessels, Sess. L. 1839, p. 70, no specific lien is given upon the vessel, until an actual levy under the attachment; and the remedy given by the act is general, and not restricted to causes of action arising within the state.

This case was decided in the Supreme Court, in March, 1842. The following is the opinion of the court:

By the court. This is a case certified from Wayne circuit court, by Mr. Justice Morell, the presiding judge of that court.

The plaintiff filed his claim and sued out an attachment against this boat, under the act of the 10th April, 1839, entitled "An act to provide for the collection of demands against boats and vessels." The plaintiff's claim is for work and labor in building the boat.

The claim, when filed with the clerk of the circuit court, stands as the declaration of the plaintiff, under the provisions of the fourth section of the act.

To this claim, a plea on behalf of the owners of the boat, to the jurisdiction of the court, was filed, setting forth that the demand of the plaintiff did not arise in this state, but in the state of Ohio; that the boat was built in Ohio, and that the cause of plaintiff's action is for labor in building and furnishing the boat in the state of Ohio, previous to the 7th July, 1840, and that the boat was never in the waters within this state until after that day.

The plaintiff demurred generally to this plea, and the respondents have joined in the demurrer.

In support of this plea it is contended:

1. That the statute gives a specific lien upon boats and vessels in certain cases, independent of the process by attachment to enforce this lien, and is in fact an adoption of a principle of the maritime law, and the modes of proceedings in the admiralty courts.

2. That the remedy by attachment to enforce such lien can only be had when this specific lien exists.

3. That the statute does not, and could not give this specific lien on a boat or vessel without the state, and in the case of labor for building the boat or vessel out of this state.

4. That this statute is remedial, and must be construed with reference to the mischief intended to be remedied. The mischief having been, that the citizens of this state were put to great loss, expense, delay and inconvenience in obtaining payment for supplies furnished, and work and labor performed on boats and vessels lying within the waters of this state, when they may be owned by residents of other states; and that the general expressions in the statute, must be limited to certain specified cases of demands mentioned in the statute, and accruing within the jurisdiction of this state.

Whether any of these propositions are sustainable, will depend upon the construction of the statute in question. The first section of the statute is in these words:

"That every boat or vessel used in navigating the waters of this state shall be liable:

"1. For all debts contracted by the owner, master, agent or consignee thereof, on account of supplies furnished for the use of such boat or vessel; on account of work done or services rendered on board such boat or vessel; on account of labor done or materials furnished by mechanics, tradesmen or others, in and for the building, repairing, fitting out, furnishing or equipping such boat or vessel.

"2. For all sums due for the wharfage or anchorage of such boat or vessel within this state.

"3. For all demands or damages accruing from the non-performance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent or consignee of the boat or vessel, on which such contract is to be performed.

"4. For all injuries done to persons or property by such boat or vessel, in all instances where the same is shown to have occurred through the negligence or misconduct of the master or hands thereon employed."

The second section provides, that:

"Any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, or consignee of a boat or vessel, may, at his option, institute suit against such boat or vessel by name.

"Sec. 3. Any plaintiff wishing to institute suit against a boat or vessel, shall file his complaint against such boat or vessel by name, with the clerk of the circuit court of the county in which such boat or vessel may be."

Sec. 5. provides, that when the complaint shall be filed, the clerk shall issue an attachment against such boat or vessel, its tackle, apparel and furniture.

By these provisions, it is manifest that a specific lien upon the boat or vessel, on the accruing of the demand in any of the causes specified in the first section, is not given, and that no lien whatever attaches to the boat or vessel until the actual levy under the attachment.

It is true the statute declares that the boat or vessel shall be liable for certain debts and demands; but by the subsequent provisions it is declared what that liability is, and directs how it may be enforced.

The first provision in the first section, that the boat or vessel shall be liable, is explained by the subsequent provisions; and if that provision had been wholly omitted, and the statute had simply declared that a claimant, having certain specified demands, might, if he thought proper, file his claim against the boat or vessel by name, and takes an attachment, it would have had the same effect, and must have received the same construction.

We think, therefore, that no lien whatever upon the boat attached at the time the demand originated or accrued, and that no lien exists under this statute until an actual levy in virtue of the attachment.

The only remaining question involved in this case is, whether the special remedy given by the statute extends to the plaintiff's claim, for labor in building this boat in the state of Ohio.

The debts and demands specified in the first section of the statute are, all debts contracted by the owner, master, agent or consignee, on account of supplies, work done, or services rendered on board; labor and materials in the building, repairing, &c.; all damages for nonperformance of certain contracts; all injuries done to persons or property, occurring through the negligence or misconduct of the master or hands on board.

Some of these, we should naturally suppose, must almost of necessity be cases of contracts or injuries made and suffered without this state.

And from the generality of the provisions, and the absence of all indications that the remedy was intended to apply only to cases arising within the jurisdiction of this state, it would be controlling the positive terms and expressions of the statute for this court so to limit the application of the remedy.

But if any doubt could otherwise be entertained upon this point, the second subdivision of the first section leaves no room for doubt as to the intention of the legislature. It is there provided, that the boat or vessel shall be liable "for all sums due for the wharfage or anchorage of such boat or vessel within this state."

As to this particular debt, the remedy is expressly limited to the cause of action arising within this state, which shows conclusively that the legislature did not intend so to limit the other causes of action specified in the act.

But it has been contended by the counsel for the respondents, that such a construction would subvert one of the first and fundamental principles of the common law and common justice, by subjecting one man's property to be taken and applied to satisfy the debts of another: that the court will intend that the legislature did not mean to establish such a rule. This principle of construction has been sometimes adopted when the intention of the legislature was not expressed in explicit and unquestionable terms. But it should be applied with the utmost caution.

It is true that Lord Coke said, in Bonham's case, 8 Rep. 116, "That where an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law shall control it, and adjudge it to be void." And Lord Holt, as a modern writer says, to the dismay of all mere lawyers, expressed an opinion that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying.

It is supposed that King James alluded to this subject, when he said that in Coke's Reports were many dangerous conceits of his own, uttered for law, to the prejudice of the Crown, Parliament and subjects. And Lord Ellesmere, in his observations on Lord Coke's Reports, calls this passage a paradox, which derogated much from the wisdom and power of Parliament, that when the three estates, king, lords and commons, have spent their labors in making a law, three judges on the bench shall frustrate and destroy their pains, advancing the reason of a particular court above the judgment of all the earldom. Lord Ellesmere further adds, "Besides, more temperately did the revered Chief Justice Herle, in the time of Edward III, deliver his opinion, 8 Ed. 3, cited by Co. Rep. 11, f. 98, when he said, some acts of Parliament are made against law and right, which they that made them perceiving, would not put them into execution; for it is *magis conqurum* that acts of Parliament should be corrected by the same pen that drew them, than be dashed to pieces by the opinion of a few judges."

And Sir Wm. Blackstone says, "If the Parliament will positively enact any thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution vested with authority to control it."

But without attempting to settle this grave question in the abstract, it appears to me that the ground upon which the objection is urged does not exist—at least, to the extent alleged. It is true, that the enforcement of this remedy may, in some cases, take the property of others than the person who made the contract, but this is not the direct and necessary result. When such a case shall occur, it will then be the time to decide whether in the given case the remedy shall be enforced to the prejudice of the claimant. Such is not this case.

The fact that the cause of action arose in the state of Ohio, does not prevent the creditor from availing himself of the *lex fori*, and the *lex rei sitae*, where he seeks to enforce the collection of his demands. The remedy is as well open to him in such case, as if he sought to enforce his demand under the general attachment law, in case the debtor was non-resident in the state, but had property here to be attached. The principle is the same.

The law of the place where the remedy is sought to be enforced, must govern, as to the nature and form of that remedy; and, however variant this law may be from that of the place where the contract was made, still it does not affect the nature and obligation of the contract. It affects only the remedy.

Plea bad—demurrer sustained.

STATE OF MICHIGAN *v.* HOW ET AL.—McREYNOLDS *v.* GODDARD ET AL.

The directors and stockholders of a bank organized under "An act to organize and regulate banking associations," Sess. L. 1837, p. 76, and the acts amendatory thereto, commonly called the general banking law, are not liable for the payment of the bills, or other indebtedness of the bank, either as stockholders and directors of the association, or as partners.

THESE cases were decided by the chancellor on the 10th March, 1846. They involved one and the same question, viz: the liability of the president and directors of banks organized under the act entitled "An act to organize and regulate banking associations," Sess. L. 1837, p. 76, and the acts amendatory thereto, for the payment of the bills and other indebtedness of the association. The first was a bill filed by the state against the president and directors of the Bank of Saline, to charge them individually with the payment of the bills of the bank, to which defendants demurred. The other case differed from the first only in that the bill was filed by an individual, and against the president and directors of another association.

Seaman, for complainant.

Romeyn, for defendants.

Chancellor. The supreme court, in the case of Green *v.* Graves, 1 Doug. Mich. R. 351, having decided the general banking law, under which the Bank of Saline was organized, unconstitutional, as it regards the corporate existence of associations organized under it, it follows the defendants cannot, under the law, be charged in their individual capacity with the debts of the bank, by reason of their being members of the corporation; for where there is no corporation there are no corporators.

But it is insisted they are liable as partners. This would undoubtedly be true, if the association had been formed for the purpose of prosecuting a business not prohibited by law. If the act in question had had for its object the incorporation of associations for manufacturing purposes, instead of banking, the only effect of the unconstitutionality of the law would have been to make them liable for the debts of the association as general partners, instead of corporators under the act.

One of the objects to be gained, and, perhaps, in some cases almost the only one, by an act of incorporation to do what the corporators might do without it, is exemption from individual liability for the debts of the association; and when the law under which such exemption is claimed is unconstitutional, the exemption itself ceases to exist, and the creditors of the association are remitted to their common law remedy for the collection of their debts. In such a case, the law under which the association had been formed would have nothing to do in fixing the liability of the associates. Their liability would be determined by the law of partnerships, and not by the act under which they had claimed a corporate existence.

Is this principle applicable to associations formed under the general banking law?

On the part of the defence, it is insisted that, by the general banking law, the legislature intended to confer the right of banking on corporations, organized in pursuance of the law, and not upon individuals, as such, associated together for that purpose; and that the law in this particular having been declared unconstitutional, all issues of bank paper by the association were illegal, under the act to restrain unincorporated banking associations (Laws of 1833, p. 530); which act was in force when the Bank of Saline was organized, and the principles of which were afterwards incorporated in the Revised Statutes, p. 221. On the other hand, it is said the general banking law is unconstitutional only as to the corporation: that in all other respects it is operative: and that by it the defendants were authorized to establish a bank, as an association, without corporate powers: that a statute may be good in part and bad in part: and that the act in question is good so far as it confers banking powers on the defendants as an association, but unconstitutional and bad as to the corporation.

The general banking law does not repeal the restraining act. It does not authorize, or profess to authorize, individual banking. Neither does it authorize defendants, or any other persons, by name, to do a banking business; and then, to facilitate their operations, undertake to confer corporate powers upon them. If it did, it might be likened unto a grant of two things, one of which the grantor had not the power to dispose of; or to an insolvent law, discharging a debtor from the payment of his debts, which has been held to be unconstitutional as to preexisting debts, and constitutional as to debts contracted subsequently to the passage of the law. In such cases the court give effect to the contract or law, so far as it can be done legally, but in the mode pointed out by the contract or law itself; that is, in the same manner it would have given effect to the whole contract or law, had no legal objection existed to enforcing it in toto.

Neither can the general banking law be construed into a repeal of the restraining act, or into a license for banking, in favor of individuals who have complied with its provisions. There is nothing in the act inconsistent with the restraining law; and I think it will appear obvious to any one who will take pains to read the act, that it was not intended to authorize individual, joint stock, or partnership banking. The object the legislature had in view was to create corporations for banking purposes. Had they not failed in this, no one would ever have thought of construing the act into a license for unincorporated banking.

But it is said, "The principal end and object of the legislature was not to create corporations: corporate powers were but a means to effect an ulterior end or object, which was supposed to be of greater practical effect and importance to the people, to wit: a supply of a paper circulating medium, or a paper currency, as a substitute for coin."

Conceding such to have been the case, does the conclusion sought to be deduced from it follow? By no means, unless we admit a power in the judiciary to do what the legislature might have done, but did not do. It will hardly be contended that, where the legislature aim to effect a particular object, and prescribe the means by which it is to be brought about, and the means prescribed fall short of the end, that the judiciary may put itself in the place of the legislature, and devise other means better adapted to the end. Such a power would devolve upon the court, legislative as well as judicial functions. The means, when prescribed, as well as the object to be achieved, must be regarded.

From this course of reasoning it follows, the Bank of Saline was an association of individuals for banking, in violation of the restraining act. And its effect upon the legal liability of the defendants, for the bills put in circulation by the association, is next to be considered.

The restraining act imposes a penalty on individuals concerned in unlawful banking, and declares all notes and securities for the payment of money, or the delivery of property, given to any such association, institution or company, null and void, without making any mention of the bills put in circulation, or contracts made by the company. But this is immaterial, for the principle is well settled, that "a contract founded upon an unlawful act, whether it be *malum prohibitum* or *malum in se*, cannot be enforced by action." Pennington *v.* Townsend, 7 Wendell 276; Bank of U. S. *v.* Osborn, 2 Peters 527.

Demurrer allowed, and bill dismissed without costs.

INDEX.

ABATEMENT.

1. Plaintiff commenced two suits against defendant on the same day, for the same cause of action—one by declaration and the other by attachment. The court presumed, nothing appearing on the record to the contrary, that the suit by declaration was first commenced, and held that a plea of that suit in abatement of the attachment suit was bad, because the plea did not state that it was still pending. Wales *v.* Jones, 254.

3. Where a plea in abatement averred another suit was commenced at the same time, upon and for the not performing the very same identical promises and undertakings, without adding, *in the said declaration in this present suit mentioned*, or other equivalent words, it was held bad on that account. *Id.*

ACKNOWLEDGMENT OF DEEDS.

1. A certificate of acknowledgment to a deed described it as the *foregoing mortgage*. *Held*, a clerical error, and that the certificate was sufficient.
Ives *v.* Kimball, 308.

2. A certificate of the acknowledgment of the execution of a deed by a feme covert, under the act, Sess. L. 1840, p. 167, sec. 4, certifying that "separately and apart from her husband she acknowledged that she executed the same freely, and without fear or compulsion of any one," without stating that it was on a *private examination*, is void. Sibley *v.* Johnson, 380.

ACTION.

1. D took a mare belonging to B, which he afterwards sold to T, against whom B brought replevin and recovered the mare. Afterwards B sued D in trespass, to recover the damages he had sustained by reason of the detention of the mare from him, and the expense he had been at in regaining possession of her. *Query*, whether an action will lie in such case. The proper action, if one will lie, is trespass and not case. Delevan *v.* Bates, 97.

2. Where the moderator of a school district refused to sign a warrant to a rate bill for teacher's wages, and a judgment was afterwards recovered by the teacher against the district for the amount due him, which was paid by a tax on the district, a tax-payer, who was assessed and had paid his part of the tax, cannot sustain an action against the moderator to recover what he had paid.
Wall *v.* Eastman, 268.

AFFIDAVITS.

1. An affidavit that it is not correctly entitled in a cause, cannot be used therein. Whipple *v.* Williams, 115.

2. A writ of error was sued out in the names of W. and R. On motion, W. was allowed to sever in the prosecution of the suit. Affidavits subsequently drawn up and entitled in the names of W. and R., were held to be erroneously entitled. *Id.*

See Statutory Foreclosure, 1. Appeal, 6.

AGENT. See Promissory Notes, 1. Principal and Agent.

AGENT OF STATE PRISON.

The statute, Sess. L., 1842, p. 130, requires the agent of the state prison to give notice, in a newspaper, for sealed proposals for letting the convicts. The agent of the prison, without giving such notice, hired convicts to defendant for a term of years. The contract was held to be void—the mode of letting prescribed by the statute being a limitation on the power itself, and not merely directory to the agent of the prison. Agent of State Prison *v.* Lathrop, 438.

AMBIGUITY. See Deeds, 2.

AMENDMENTS. See Replevin, 3. Appearance. Under Sheriff.

APPEAL.

In Chancery.

An order made by the chancellor denying a motion to stay a sale under a decree of foreclosure, and vacating a temporary order granted staying the sale until such motion could be heard and disposed of, cannot be appealed from. Romeyn *v.* Hale, 93.

From Justices' Court.

1. Facts that come to the knowledge of a justice after the trial of a cause, are properly no part of his return, and must be rejected. Savier *v.* Chipman, 116.

2. A party who has stayed execution on a judgment against him in a justice's court, cannot afterwards appeal. People *v.* Judges of Macomb Circuit Court, 134.

3. Under the act, Sess. L. 1845, p. 98, a plaintiff against whom a judgment is rendered in a justice's court for costs only, amounting to less than $4, may appeal, and no affidavit under sec. 2 of the act is necessary to perfect the appeal in such case. Wilson *v.* Davis, 156.

4. Where a statute provides that "if any party shall appeal" &c. from a judgment rendered by a justice, "such party, his agent or attorney," shall enter into a recognizance: *Held*, the appeal might be taken and the recognizance entered into by the person for whose use the suit was brought. *Id.*

5. Where an affidavit for an appeal from the judgment of a justice, under sec. 2 of the act, Sess. L. 1845, p. 98, was made by an attorney of the party and sta-

ted, that plaintiff recovered five dollars more than was justly and honestly due him, as deponent believed, from the facts and evidence in the cause, which were fully communicated to him, it was held sufficient. Austin *v.* Strong, 259.

6. The recognizance for an appeal under the act, Sess. L. 1845, p. 98, must be taken before the justice by whom the cause was tried. *Id.*

APPEARANCE.

The omission of the clerk to enter defendant's appearance in a cause, is mere matter of form, which may be amended by an order *nunc pro tunc.*
Norvell *v.* McHenry, 227.

ARBITRATION.

1. A submission to arbitration of the subject matter of a suit, is a discontinuance of the suit, and discharges the surety for costs. Dunn *v.* Sutliff, 24.

2. D. brought a suit in attachment in the county court against V., who appeared and moved to quash the attachment for an alleged defect in the affidavit on which the attachment was issued, which motion was denied. Issue was then joined, and the subject matter of the suit was afterwards submitted by the parties under the statute (R. S., ch. 129), to arbitrators, who made an award in favor of D., on which a judgment was rendered by the court. V. brought error, and insisted on the supposed defect in the affidavit as a ground for reversing the judgment. It was *Held,*

(1.) That the submission of the subject matter of the attachment suit to arbitrators was a discontinuance of the suit.

(2.) That as the court had power under the statute to render judgment on the award of the arbitrators, that part of the record anterior to the submission might be rejected by the court.

(3.) That the submission was a waiver of all errors up to the time of making it. Vanderhoof *v.* Dean, 463.

ATTACHMENT.

An order made by the court, under R. S. 1838, for the sale of real estate taken in an attachment suit, goes to the sheriff in office for the time being, and not to his predecessor who served the writ of attachment. Crane *v.* Hardy, 56.

ATTORNEYS.

1. R. S. ch. 95, sec. 34, provide that any attorney, solicitor or counsellor may be removed or suspended, who shall be guilty of any deceit, malpractice, crime or misdemeanor. The court may remove or suspend an attorney for other causes than those mentioned in the statute, which is not to be construed as restrictive of the general powers of the court over its officers. Mills, An Attorney, 392.

2. A charge made against an attorney, for the purpose of removing him, that he is of notoriously bad character, not to be believed under oath, and unworthy to practice as an attorney, is too general. Specific acts should be charged, so as to give the respondent an opportunity of answering them. *Id.*

3. But a charge that the reputation of an attorney for truth and veracity is so notoriously bad that he is not to be believed under oath, contains good cause for removal, and is not too general. *Id.*

AVERMENT. See EVIDENCE, 4.

BANKRUPTCY.

What is a sufficient allegation that E. P. H. was the assignee in bankruptcy of W? Williams *v.* Hubbard, 446.

BANKS.

The directors and stockholders of a bank organized under "An act to organize and regulate banking associations," Sess. L. 1837, p. 76, and the acts amendatory thereto, commonly called the general banking law, are not liable for the payment of the bills, or other indebtedness of the bank, either as stockholders and directors of the association, or as partners. State of Michigan *v.* How, 512.

See UNCONSTITUTIONAL LAWS, 2.

BILL IN CHANCERY.

1. Where the discovery sought by a bill can only be assistant to the relief prayed, a ground of demurrer to the relief will also extend to the discovery; but if the discovery have a further purpose, the complainant may be entitled to it, though he has no title to the relief. Manning *v.* Drake, 34.

2. Facts essential to the complainant's title to maintain his bill and obtain the relief, must be alleged positively, and cannot be inferred from other facts stated. Accordingly, where a bill filed by a judgment creditor to reach land alleged to have been fraudulently conveyed to C. by his debtor, set forth the conveyance, and alleged that the debtor afterwards continued in possession the same as before, and as he from time to time sold parcels of the land, deeds were executed by C. to the purchasers, or to the debtor and then by him to the purchaser, but contained no direct averment that at the time of the alleged fraudulent conveyance the debtor had or pretended to have any interest in the lands, it was *Held*, bad on general demurrer. *Id.*

3. An averment that A and B were appointed and acted as administrators, without alleging that they accepted the trust, is a sufficient allegation that they were administrators. *Id.*

BOARD OF COUNTY CANVASSERS.

1. A statement of the number of votes given at an election for the respective candidates, required to be made out and filed in the county clerk's office, by the board of county canvassers, is *prima facie* evidence only of the facts stated in it. The county canvass may be corrected by the township canvasses, and these by the ballots themselves. People *v.* Van Cleve, 362.

2. The determination of the board of county canvassers of the persons elected, is *prima facie* evidence only of their election. *Id.*

3. A party may go behind the canvass to the ballots, if not beyond them, to show the number of votes cast for him. *Id.*

4. The duties of the board of canvassers are wholly ministerial. *Id.*

See Parties to Bill in Equity.

BOATS AND VESSELS.

1. The act to provide for the collection of demands against boats and vessels, Sess. L. 1839, p. 70, gave a new and cumulative remedy, but did not give a lien on the vessel itself until taken on the attachment; and the remedy given by that act was not reserved by sec. 2, ch. 173, R. S., (which chapter repealed the act,) to a party whose proceedings were not instituted under the act before its repeal—such remedy not being a *right accrued* within the meaning of these words as used in that section. Robinson *v.* Steam Boat Red Jacket, 171.

2. Chap. 122, R. S., does not give a lien for means and supplies furnished, or for money advanced, in the building, fitting and furnishing of a vessel. The lien in such case is restricted to work done and *materials* furnished.
Lawson *v.* Higgins, 225.

3. Chap. 122, R. S., of proceedings for the collection of demands against ships, boats and vessels, applies to contracts made and injuries received within the state only, and not to such as have arisen without the state, and gives a specific lien on the boat or vessel for all such demands mentioned in the first section of the chapter. Bidwell *v.* Whitaker, 469.

4. By the act to provide for the collection of demands against boats and vessels, Sess. L. 1839, p. 70, no specific lien is given upon the vessel, until an actual levy under the attachment; and the remedy given by the act is general, and not restricted to causes of action arising with the state.
Moses *v.* Steam Boat Missouri, 507.

BOND.

1. A bond in these words, "Know all men by these presents, that I, A B, principal, and C D, E F, and G H, sureties, *are* held," &c., "for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors and aministrators, *severally*, firmly by these presents," is a joint as well as several bond. Supervisors of St. Joseph *v.* Coffenbury, 355.

2. A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, although there is no statute requiring such a bond to be given. *Id.*

CERTIORARI.

1. A certiorari will not lie to remove proceedings had before a justice of the peace, under R. S. 1838, to determine whether a mill pond is unhealthful and productive of the decay of standing, lodged, or fallen timber.
Root *v.* Barnes, 37.

2. Where commissioners of highways laid out and established a road, and an appeal was taken from their decision to the township board, which affirmed what

the commissioners had done, a certiorari sued out for the purpose of reviewing the decision of the *township board*, directed to the *commissioners* instead of the township board, was dismissed for irregularity.

Goodrich *v.* Commissioners of Lima, 385.

3. A certiorari lies to the county court to review a judgment of that court on proceedings instituted under ch. 42, R. S., as the cause cannot be carried to the circuit court of the county for review, under ch. 92, R. S.

Perkins *v.* Superintendents, &c., 504.

See County Court, 4.

CHALLENGES.

1. A challenge to the array must be in writing. People *v.* John Doe, 451.

2. The most usual mode of trying the impartiality of a juror, challenged for favor, is by triers appointed for that purpose, on the demand of the challenging party; but it is not the only legal mode. *Id.*

3. Where a juror is challenged for favor, and the challenging party, when asked by the court how he will have the challenge tried, refuses to indicate the mode of trial, it may be tried by the court by administering an oath to the juror, and propounding questions to him. *Id.*

4. If a party or his counsel interpose a challenge for favor, or raise any other preliminary question involving an inquiry, and then neglects or refuses to move the trial or examination thereof, he thereby waives such challenge or question. *Id.*

CHANÇERY. See Bill in Chancery. Jurisdiction, 4.

CO-DEFENDANTS. See Decree.

COLLECTOR OF TAXES.

The oath required to be taken by a collector of taxes (sec. 9, ch. 4, tit. 5, part 1, R. S.) on returning lands on which the taxes have not been paid, may be administered by the deputy county treasurer, in the absence of the treasurer from his office. Malonny *v.* Mahar, 26.

COMMISSIONERS OF HIGHWAYS.

Plaintiff sued defendant on the following instrument: "The commissioners of highways of the township of Rowland will pay the bearer twenty-two dollars when funds in road district number three and four.

Alexander Palmer,
Rowland, Feb'y 22d, 1841. Henry Cornwell,
Comissioners of highways in the township."

Held, it was not a warrant or order upon the township treasurer, under the act, Sess. L. 1841, p. 159, sec. 5, but a draft drawn by commissioners upon themselves, and that an action could not be sustained upon it against the township.

Monroe *v.* Township of Rowland, 318.

CONDITION. See Deeds, 4.

CONFESSION OF JUDGMENT. See Jusices' Court, 6.

CONSPIRACY.

1. An indictment lies for a conspiracy to cheat an individual of *real* estate, as well as of personal property. People *v.* Richards, 216.

2. A conspiracy to commit a felony, when committed, is merged in the felony; but a conspiracy to commit a misdemeanor is not merged in the misdemeanor. *Id.*

3. In conspiracy, the offence consists in the unlawful agreement, and not in the acts that follow it. *Id.*

CONSTITUTION. See UNCONSTITUTIONAL LAWS.

CONSTRUCTION.

Of Deeds.

1. Where N. and M. owned a water power with a grist mill and saw mill, as tenants in common, and they divided a part of the property so held in common between them, one taking the grist mill and the other the saw mill, and executed releases to each other, the releases must be taken and construed together as one instrument, and with reference to all the surrounding circumstances, to which they obviously and directly point; and by such circumstances, not only the parties, but all persons claiming title under them, are bound. Norris *v.* Hill, 202.

2. In giving a construction to an instrument, the whole of it must be examined, and every part of it be taken into consideration; and the situation of the parties and the subject matter of the transaction may also be taken into consideration. Paddack *v.* Pardee, 421.

See DEEDS, 4, 5.

Of Statutes.

1. The defendant, on being arraigned in the county court on an indictment for murder, requested to be tried before the circuit judge, under the provisions of sec. 7 of the act to regulate and define the jurisdiction of the circuit and county courts. Sess. L. 1848, p. 237. On the day appointed for the commencement of the next regular term of the circuit court, the circuit judge did not appear, and his absence was noted on the journal by the clerk, and the court adjourned to the next day, when the circuit judge appeared and assigned a day for the trial of the cause. It was *Held*, that the statute requiring the assignment to be made on the first day of term, was, as to time, directory only, and that the assignment made on the second day of term was good within the statute. People *v.* John Doe, 451.

3. It is only where a statute is ambiguous in its terms, that courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the law maker. Bidwell *v.* Whitaker, 469.

CONTRIBUTION. See WATER POWER.

COSTS.

Surety for costs in a justice's court, in case of appeal, is liable for costs in the appellate court. Dunn *v.* Sutliff, 24.

COUNTY.

The county is not liable to an attorney for defending a prisoner at the request of the court, where the prisoner is poor and unable to employ counsel. Bacon *v.* County of Wayne, 461.

COUNTY COURT.

1. H. commenced a suit against S., in the county court, by filing a declaration and making and filing an affidavit, under the first subdivision of sec. 39, R. S. 384, on which a warrant was issued against S., who was arrested and brought into court, when he applied for and obtained an adjournment of the cause, without pleading, on giving bail. On the adjourned day he appeared and moved to set aside the proceedings, for the reasons: 1, That the affidavit was not annexed to and returned with the writ. 2, That the note and mortgage on which the suit was brought, were not filed at the time of filing the declaration. 3, That a copy of the affidavit was not served on him;—which motion was overruled. He then offered to introduce testimony to controvert the facts stated in the affidavit—which the court refused to receive. *Held*, 1, That it was too late after his appearance to the action by giving bail, to object to the regularity of the proceedings or the sufficiency of the affidavit. 2, That on their merits the questions were rightly disposed of by the county court. Stewart *v.* Hill, 265.

2. An order made by a county court, dismissing an appeal, is a judgment that may be reviewed by the circuit court, within the meaning of the 67th section of the act to consolidate the laws in relation to county courts, and for other purposes. Sess. L. 1849, p. 288. People *v.* Judge of Wayne Co. Court, 359.

3. An order made under the act, Sess. L. 1848, p. 237, by the county judge for summoning a jury to try a cause before the circuit judge, more than three days before the day assigned for the trial, is in compliance with the letter and spirit of the act. People *v.* John Doe, 451.

4. The verdict of a jury in the county is not conclusive as to the facts of the case, on certiorari to the circuit court. Herring *v.* Hock, 501.

5. The judgment of a county court is to be reviewed on its merits. The verdict of a jury in that court should not be disturbed for slight causes; but where it is manifestly unsupported by evidence, the judgment should be reversed. *Id.*

6. On reversing the judgment of a county court, the circuit court may, in its discretion, award a new trial under the act. Sess. L. 1849, p. 290. *Id.*

COUNTY COURT. See Deputy County Clerk.

COUNTY CANVASSERS. See Board of County Canvassers.

CORPORATIONS.

The charter and by-laws of municipal corporations are subject to general legislation. Smith *v.* Village of Adrian, 495.

See Evidence, 13. Taxes.

CREDITORS' BILL.

1. A creditor's bill filed after the return of an execution unsatisfied, to reach equitable assets and to set aside a fraudulent conveyance of real estate made by the debtor to a third person, cannot be sustained against the latter unless the creditor has obtained a lien on the real estate by a levy of his execution. McKibben *v.* Barton, 213.

2. The return of an execution on the return day is a good return for the purposes of a judgment creditor's bill under the statute. Williams *v.* Hubbard, 446.

3. Where the officer returned, to an execution against two defendants, that they had no goods or chattels, lands or tenements, without in terms negativing the fact that either of them had, the return was held sufficient. *Id.*

4. On a judgment creditor's bill, the regularity of the judgment and execution cannot be inquired into. *Id.*

5. Where the test day of an execution, and the day a levy was made, are stated in the bill, but not the return day of the execution, the court will take judicial notice of the terms of the court out of which the execution issued, for the purpose of ascertaining whether the levy was made in the life-time of the execution. *Id.*

6. Where one of several judgment debtors is wholly irresponsible and destitute of property, he need not be made a party to a judgment creditor's bill. *Id.*

DAMAGES.

1. In trover, by one having a lien on goods against the general owner, or against one who has converted the goods by his direction, the plaintiff can recover only according to his special interest; but against a stranger the full value of the goods may be recovered, although exceeding the lien, and the plaintiff will be a trustee for the general owner as to the balance. If the goods converted are of less value than the amount of the lien, no more can be recovered than their value. Davidson *v.* Gunsolly, 388.

2. The same rule prevails in replevin, under R. S., ch. 124, sec. 29, p. 549, where either of the parties, at the commencement of the suit, has only a lien upon or special interest in the goods replevied, and is not the general owner. *Id.*

DEBTOR AND CREDITOR. See FRAUDULENT CONVEYANCES.

DECLARATION.

1. In declaring on a promissory note absolute on its face and in the ordinary form, it is not necessary to notice a contemporaneous agreement in writing varying the terms of the note, contained in a *separate paper*. Such agreement is matter of defence only. Smalley *v.* Nelden, 153.

2. Where, in declaring for a penalty given by ch. 41, R. S., for selling spirituous liquor without a license, the plaintiff adopts the form of declaration given by sec. 32, he cannot be required, on the trial, to elect the penalty or penalties he seeks to recover. Smith *v.* Village of Adrian, 495.

See VARIANCE, 1, 2, 3.

DECREE.

A decree may be made between co-defendants, grounded upon the pleadings and proofs between complainant and defendants. Thurston *v.* Prentiss, 194.

DEEDS.

1. A grant of land bounded by a stream, carries with it the bed of the stream to the centre, unless a contrary intention clearly appears from the conveyance itself. Norris *v.* Hill, 202.

2. A deed described a piece of land, as all that tract or parcel of land situate in the town of Logan, county of Lenawee, and territory of Michigan, being known and distinquished as the east half the north-west quarter of section *twenty-one*, in township number *twenty-six* south, of range number *three*. There was no surveyed township number *twenty-six* in Logan. *Held*, that the number of the township might be rejected, as repugnant to the other parts of the description. And, it appearing from the act organising the town, that there were two sections numbered *twenty-one* in the town, corresponding with the description in the deed, one in surveyed township numbered six, and one in surveyed township numbered seven, both in range *three* east, the same was held not to be a patent ambiguity, although the court was bound judicially to take notice of the act organizing the town, and that parol evidence of surrounding circumstances and collateral facts might be received to show which of the two sections was intended by the grantor. Ives *v.* Kimball, 308.

3. A conveyance of all one's right, title and interest in land, will pass the grantor's interest in a mortgage on the same land. Niles *v.* Ransford, 338.

4. A conveyed a farm to B, his son-in-law, in consideration of $2,500. By the same instrument, B bound himself to pay the debts of A, especially a mortgage on the farm, and to account to A for the balance of the $2,500, after paying the debts; and B promised and obligated himself, besides the payment of the $2,500, to board, lodge and clothe A, in health and in sickness, during his natural life, &c., and A reserved to himself the right to live with B; and for the security of the payment of $2,500, and the fulfilling of the "clauses and conditions" above stated, B was not to give, alien, exchange or sell the farm without the permission of A, and the farm was to stand hypothecated till the payment in full of the $2,500, when A was to "release the present mortgage in a legal manner." *Held*,

(1.) That the deed was neither a deed of trust, nor upon condition; but that it was an absolute deed, incorporating within it a lien, in the nature of a mortgage, to the grantor for the $2,500 consideration money.

(2.) That the undertakings on the part of the vendee were personal covenants, and not conditions of the grant.

(3.) That if the covenant against alienation could be considered a condition, it was void. Campau *v.* Chene, 400.

5. A deed described the premises conveyed as a certain piece or parcel of land situate in out lot No. 10, in the village of Pontiac, to comprise lots Nos. 1 and 9, on the west part of the subdivision of the aforesaid lot No. 10, the same being 112 feet wide, on the Mt. Clemens road to the centre of the road leading

to the woolen factory, and extending in length to the centre of the Clinton river, with the privilege of fifty square inches of water, to be applied five feet from the surface of the Clinton river, opposite the place of taking the water from the race—to be subject at all times and forever to the woolen factory, and one run of stones for flouring, after such mill shall be erected—the dam and race to be forever put in repair by said party of the first part—the said two lots being a strip of land off from the south-westerly side of said out lot No. 10, and being designated on a plat of the subdivision of said out lot, this day recorded. *Held*,

(1.) That the plat of the subdivision of lot No. 10 might be referred to for the purpose of giving a construction to the grant.

(2.) It appearing from the plat that lots 1 and 9 were separated by a strip of land marked "race and alley," and that lot No. 1 lay northerly of it, and between it and the Mt. Clemens road, and lot No. 9 lay southerly of it, and between it and the Clinton river, it was held that the fee in said strip of land did not pass by the deed.

(3.) That the grantee could not draw the water through an orifice of fifty square inches into a flume or reservoir upon his own premises, and then apply it by a larger discharge than fifty square inches, thereby enabling him, a portion of every twenty-four hours, to drive machinery requiring more than fifty square inches of water to propel it. Paddack *v.* Pardee, 421.

See Construction of Deeds. Acknowledgement of Deeds.

DEMURRER.

In Chancery.

See Bill in Chancery, 1, 2. Lapse of Time, 4.

At Law.

See Replevin, 2.

DEPUTY COUNTY CLERK.

Under R. S. 1838, a deputy county clerk need not sign a writ in the name of the clerk. Where it was signed, "W. M., deputy clerk, and in the absence of the clerk," held sufficient. Calender *v.* Olcott, 344.

DETROIT CITY.

1. The power to lay out the town of Detroit, given the governor and judges of the territory of Michigan, by the act of Congress of April 26, 1806, entitled "An act to provide for the adjustment of titles to land in the town of Detroit, and territory of Michigan, and for other purposes," was fully executed by the governor and judges on 27th April, 1807. People *v.* Carpenter, 273.

2. A flight of stairs, fifteen feet high and three feet eight inches wide, within the limits of Woodward Avenue, in the city of Detroit, leading from the ground to the second story of a building standing on the line of the street adjacent to the stairs, is an obstruction of the street not authorized by the acts of the governor and judges of the territory of Michigan, of the 18th May, 1807, and 7th November, 1815, nor by the ordinances of 1836 and 1842, of the common council of the city. *Id.*

3. Neither the governor and judges of the territory of Michigan, nor the common council of the city of Detroit, had, or have, any power or authority to grant the exclusive use of any of the streets or alleys of the city to individuals. *Id.*

DEVISE. See Wills.

DISCONTINUANCE. See Arbitration, 1, 2.

DIVORCE.

Where in chancery the order for the appearance of a non-resident defendant in a divorce case, was not in compliance with sec. 12, ch. 2, tit. 7, part 2, R. S. 1838, but was the same as in other cases of non-resident defendants, the decree of the chancellor granting a divorce was reversed for want of jurisdiction. Freeman *v.* Freeman, 480.

DOWER.

1. Under the ordinannce of 1787, a widow is entitled to dower, as at common law, in all the lands of which her husband was seized during coverture. May *v.* Rumney, 1.

2. On the 1st July, 1796, and prior thereto, C. was in possession of certain lands which he conveyed by warranty deed, in February, 1798, to M., who took possession of them under the deed from C., and, in October, 1800, by warranty deed, in which his wife did not join, conveyed them to P., who took possession under the deed to him. By an act of Congress entitled "An act regulating the grant of lands in the territory of Michigan," approved March 3d, 1807, it was provided that the fee simple of any tract or parcel of land that was settled, occupied and improved prior to the 1st day of July, 1796, should be granted to the person or persons in the actual possession, occupancy and improvement thereof, and commissioners were appointed for the purpose of ascertaining and deciding on the rights of persons claiming the benefit of the act. P. claimed the premises before the commissioners under the aforesaid deeds and his possession of the land under them, which claim was allowed, and a patent was subsequently issued to him for the land by the government. In an action brought by the widow of M. for her right of dower, *Held*, she was entitled to dower therein. May *v.* Specht, 187.

See Limitation of Actions, 1, 2.

EJECTMENT.

Under R. S. 1838, ejectment must be brought against the person in actual possession of the premises, when they are occupied by any one. Lockwood *v.* Drake, 14.

See Verdict, 1. Evidence, 1. Unconstitutional Laws, 1.

ELECTION. See Declaration, 2.

ERROR.

1. Where, on error, a motion to set aside the service of a declaration appeared in the transcript of the record, it was held that it could not be noticed, as it was not properly before the court. Millerd *v.* Reeves, 107.

2. It is not error for the court, after the jury have retired to consult of their verdict, to permit them, on their request, to have the Revised Statutes in their room, although the same is objected to by the prisoner's counsel.

Findley *v.* People, 234.

3. Where the court charged the jury that the question, whether plaintiff was a practicing physician, had reference to the business he was engaged in, rather than the skill with which he exercised that business: *Held*, that the charge was erroneous, as it was calculated to, and probably did, mislead the jury. Had the court stated to the jury, it had reference to the business in which the plaintiff was engaged, rather than the *degree* of skill with which he exercised it, the jury would have understood that *some degree* of skill was necessary.

Sutton *v.* Facey, 243.

4. Disputed questions of fact cannot be reviewed, on a writ of error brought on a judgment of the circuit court affirming, on certiorari, a judgment of the county court. Miller *v.* Chaffee, 257.

5. Where the charge of the court to the jury, whether right or wrong, is in favor of the party excepting, it will not be reviewed, on error.

Bingham *v.* Gurney, 349.

See Justices' Court, 7.

ESTOPPEL.

1. M., in 1815, conveyed certain premises by warranty deed to R., who afterwards died, and E. R., his widow, applied to the governor and judges of the territory of Michigan, as the widow and legal representative of R., under the act of Congress of April 21, 1806, entitled "An act to provide for the adjustment of titles of lands in the town of Detroit and territory of Michigan, and for other purposes," placing her application on the deed from M. to R., and in pursuance of such application the premises were deeded to her. In an action of ejectment brought by the widow of M. for her right of dower in the premises, it was held E. R. and those claiming under her were estopped, by the deed from M. to R., from denying the seizin of M. May *v.* Tillman, 262.

2. A lessee of a mortgagor is not estopped, in an action of ejectment brought against him by the mortgagor, from showing his interest in the demised premises as assignee of the mortgagee, to protect his possession.

Niles *v.* Ransford, 338.

EVIDENCE.

1. Whether in ejectment for land purchased at sheriff's sale by one not a party to the execution, it is necessary to prove the judgment on which the execution was issued. *Query*. Crane *v.* Hardy, 56.

2. The journal of the court, in which its judgments and all its proceedings are entered from day to day, and signed by the court, is sufficient evidence of a judgment. *Id.*

3. A warrant of attorney and plea of a defendant taken from the files in the case, is evidence, in the same court, of the appearance of the defendant in the suit. *Id.*

4. In an action on the case for flowing land, the declaration alleged plaintiff was lawfully seized in fee and possessed of the land flowed. *Held*, that the whole averment was material, and must be proved as stated. *Held*, also, that proof of plaintiff's possession under a claim of title founded upon a deed, not emanating from the source of title, or traced back to a person so claiming, did not raise a legal presumption of seizin in fee in the plaintiff; and further, that if such possession was evidence of seizin, it was at most but a bare presumption, liable to be overcome by other proof, as title in a third person.
Lull *v.* Davis, 77.

5. In an action of tort, every thing that may properly be considered by the jury in mitigation of damages, may be given in evidence under the general issue. Delevan *v.* Bates, 97.

6. Where the files in a cause have been lost, the calendar entries may be given in evidence to show the steps taken in the cause before judgment.
Norvell *v.* McHenry, 227.

7. A court will take notice of its own officers, otherwise where the officer is of another court. *Id.*

8. Proof of plaintiff's having practiced as a physician is *prima facie* evidence of his professional character; and after such a *prima facie* case has been made out, a witness may be asked, "Was the plaintiff skilled in healing?" for the purpose of showing the plaintiff had no knowledge of the healing art.
Sutton *v.* Facey, 243.

9. Under the act of April 12, 1827, Laws 1833, p. 281, the record of a deed executed and acknowledged in the state of New York, in conformity with its laws, with the acknowledgment certified by the officer taking it, in his official capacity, is evidence, without proof of the official character of the person taking the acknowledgment, or the genuineness of his signature.
Ives *v.* Kimball, 308.

10. A record made in October, 1847, by a probate court, of a decree of the same court made in February, 1837, admitting a will to probate, is good evidence of the probate of the will. *Id.*

11. Where S. and M. are engaged as partners in keeping a recess, and selling liquor without a license, the selling of liquor by M. is the act of both, and may be given in evidence against S., in an action against him alone for the penalty.
Smith *v.* Village of Adrian, 495.

12. To recover the penalty given by sec. 1, ch. 41, R. S., for selling liquor without a license, it is not necessary for plaintiff to show defendant assumed to act as tavern keeper or common victualler. *Id.*

13. In a suit by a corporation, created under the laws of the state, it need not prove its corporate existence under the general issue, unless defendant has given notice, with his plea, that plaintiff is not a corporation. R. S., ch. 116, sec. 6. It is otherwise at common law. *Id.*

14. In an action for the penalty given by statute for selling liquor without a license, plaintiff need not prove defendant had no license, which will be taken to be true, unless disproved by defendant. Neither will the plaintiff be re-

quired to show the question of license or no license was submitted to the people at the preceding charter or township election, in pursuance of ch. 41, R. S. *Id.*

EXECUTION. See SALE OF REAL ESTATE, &c., 2.

FEME COVERT. See ACKNOWLEDGMENT OF DEEDS, 2.

FLOWING LAND.

R. sued M. for flowing a tract of land, alleging seizin and possession in himself. On the trial the only evidence of title given by R. was possession, for about one year, previous to bringing the action. It further appeared in evidence that previous to, and at the time R. took possession, a part of the tract was flowed by M. *Held*, that by reason of M.'s prior possession, by flowing, of that part of the tract covered with water, at the time R. took possession, that R. could not sustain his action without showing title in himself to the land flowed, or that he entered and took possession of the tract by color of a paper title.
Millerd *v.* Reeves, 107.

See EVIDENCE, 4. LICENSE, 1.

FORCIBLE ENTRY AND DETAINER.

1. Where A obtained possession of the premises occupied by B, by knocking the door open with a hammer in B's absence, and in A's absence B soon afterwards re-entered by similar violence. *Held*, that A's temporary occupation so acquired, was not such *quiet and peaceable* possession as would enable him to maintain forcible entry and detainer under R. S. Harrington *v.* Scott, 17.

2. To sustain a complaint for unlawful and forcible entry and detainer, under R. S., there should be proof of such acts of violence as amount to a breach of the peace. Proof that the defendants (there being only two of them) repaired alone to the premises, and that one of them pounded upon the door and it was opened, whereupon they both entered, is not sufficient. *Id.*

FORECLOSURE.

Where the bill charges an instrument to be a mortgage, asks to have it foreclosed as such, and contains a prayer for other or further relief, the court may declare it to be a mortgage, although there be no special prayer for that purpose in the bill.

See STATUTORY FORECLOSURE, 1. PARTIES TO BILL IN EQUITY. LAPSE OF TIME, 1, 2, 3.

FRAUDULENT CONVEYANCES.

1. A bill filed by a creditor against the administrators of his deceased debtor, and others, to set aside a fraudulent conveyance of land made by the deceased in his life-time, so that the land might be available for the payment of his debts, is not within R. S., p. 288, sec. 10, prohibiting the commencement of suits against administrators within one year after their appointment, &c., the land not being assets in the hands of the administrators. Manning *v.* Drake, 34.

2. Where a debtor makes a voluntary conveyance of property in fraud of his creditors, to one who afterwards becomes bankrupt, the creditors of the grantor will be entitled to the property for the payment of their demands as against the assignee of the bankrupt. *Id.*

3. A deed fraudulent as to creditors is not void but voidable, and can be avoided only by a judgment creditor, or one claiming under him, who has taken out execution and levied on the property fraudulently conveyed.
Fox *v.* Willis, 321.

4. Where a debtor conveyed property in trust for creditors, which conveyance was fraudulent as to the creditors, and afterwards gave a mortgage on a part of the same property to a creditor who was aware of the previous conveyance, for the payment of a judgment the creditor had against him: *Held*, that the mortgagee, though a judgment creditor, inasmuch as he had not taken out execution on his judgment and levied on the land fraudulently conveyed, could not call in question the validity of the prior conveyance; and that he was not protected against it as purchaser for a valuable consideration, by ch. 1, tit. 6, part 2, R. S. of 1838. *Id.*

GENERAL ISSUE.

1. The general issue, *not guilty*, in replevin under R. S. 1838, p. 523, as amended by Sess. L. 1839, p. 230, sec. 44, puts in issue every fact stated in the declaration necessary to sustain plaintiff's action, and not the detention of the property only. Loomis *v.* Foster, 165.

2. The general issue cannot be pleaded in a cause in the county court, or in the circuit court, under the act to regulate and define the jurisdiction of the circuit and county courts, Sess. L. 1848, p. 236. The pleadings in both courts must conform to the provisions of ch. 92, R. S. Porter *v.* Kimball, 239.

3. The general issue in all civil actions under R. S., ch. 99, sec. 22, traverses every material averment in the plaintiff's declaration, which must be proved, whatever the nature or form of action may be. Kinnie *v.* Owen, 249.

4. Under the general issue in covenant, the defendant may show the deed is not his by proving a lack of power in the agent who executed it on his behalf.
Agent of State Prison *v.* Lathrop, 438.

See Evidence, 5.

GRAND JURY.

1. Where the grand jury have finished their business and been dismissed before the adjournment of the court without day, they may be re-summoned at any time during the term, to inquire into an offence committed subsequently to their discharge; and grand jurors who were originally summoned, but did not appear and act with their fellows before they were dismissed, may be re-summoned, and on appearing and being sworn and empanneled, may act with them on their second convocation. Findley *v.* People, 234.

2. A grand juror who appears after the jury have been sworn and received the charge of the court, may or may not be sworn, in the discretion of the court, where there are enough grand jurors without him. *Id.*

HOMICIDE.

The degree of force, or the means to be employed, in protecting one's person or personal liberty, must depend on circumstances. To justify a person in taking the life of another, it must appear his safety required him to do so.
People *v.* John Doe, 451.

INDICTMENT.

1. In an indictment for publishing a bawdy and obscene paper, it is not necessary to set forth the obscene matter on which the people rely for a conviction. People *v*. Girardin, 90.

2. An indictment for perjury must aver the false allegation was material to the matter in question, or it must clearly appear from the indictment to have been so from the statement alleged to be false. People *v*. Collier, 137.

3. Where an indictment for perjury stated, "It became and was material to ascertain the truth of the matters hereinafter alleged to have been sworn to," stating what defendant swore to, the averment was held insufficient. *Id.*

4. In an indictment for a conspiracy, the agreement or combination must be set out, but the means to be used in executing the conspiracy need not be set forth in the indictment, unless they are a component part of the offence, as where the combination and the object to be attained are not in themselves unlawful, but the means to be used, to effect the object, are unlawful. People *v*. Richards, 216.

5. An indictment for a conspiracy to cheat an individual of his lands and goods, need not state the means by which it was to be accomplished. *Id.*

6. On an indictment for murder generally, as at common law, the prisoner may be found guilty of murder in the second degree, under R. S., ch. 153, p. 658. People *v*. John Doe, 452.

See CONSPIRACY, 1, 2, 3.

INFORMATION. See QUO WARRANTO.

INJUNCTION.

Where complainants owned the water power on the east side of a river, and one-half of the water power on the opposite or west side—the defendant owning the other half, and defendant had occasionally used more than his share of the water on the west side of the river, but no suit had been brought against him for doing so, and complainants had no machinery on that side of the river to be propelled by water, an injunction will not be granted restraining defendant in the use of the water. Norris *v*, Hill, 202.

INNUENDO.

An innuendo is bad when there is nothing previously stated to which it can refer. People *v*. Collier, 137.

JAY'S TREATY.

The stipulations contained in the treaty of London, known as Jay's Treaty, for the protection of the rights of property, imposed no new obligation upon the government of the United States, but were only in affirmance of the law of nations. May *v*. Specht, 187.

JOURNAL OF THE COURT. See EVIDENCE, 2.

JUDGMENTS.

A judgment is not a contract within the inhibition of the constitution of laws impairing the obligation of contracts. Crane *v.* Hardy, 56.

See Justices' Court, 6.

JUDGMENT RECORD.

The R. S. contain no provision as to judgment records, and repeal the former law relative thereto. The files and journal entries of the court are to be deemed a substitute for such record, and as constituting the record itself, as well in cases of judgments rendered before the repeal of the late law, where no record has been made up, as in cases arising since. Norvell *v.* McHenry, 227.

JUDGMENT CREDITORS' BILL. See Creditors' Bill.

JURISDICTION.

1. Nothing is to be presumed in favor of the jurisdiction of a justice of the peace, which must be shown affirmatively. Spear *v.* Carter, 19.

2. Where jurisdiction is unqualifiedly withheld, consent, or the confession of a judgment, will not render the proceedings valid. *Id.*

3. A judgment against C., in a justice's court, for $24 22 damages and $1 92 costs, was stayed by S. for six months, instead of three months as the statute required. After the expiration of the six months, the justice issued execution on the judgment against both C. and S., on which a mare belonging to S. was taken and sold. In an action of trespass for taking and selling the mare, by S. against the justice, *Held*, the justice had no right to issue the execution against S., for want of jurisdiction, and that, in doing so, he was a trespasser.
Shadbolt *v.* Bronson, 85.

4. The provision of R. S., p. 509, conferring jurisdiction, in cases of nuisance, on equity courts, was not intended to extend or enlarge their jurisdiction.
Norris *v.* Hill, 202.

See Justices' Court, 1, 2, 4, 5.

JUSTICES OF THE PEACE.

A justice of the peace who receives uncurrent or depreciated bank bills of a constable, and gives a receipt for the amount on the back of the execution, is liable for so much money to the judgment creditor, in an action for money had and received, after demand and refusal, who is not restricted to the remedy given him by statute on the justice's bond. Welch *v.* Frost, 30.

See Jurisdiction, 1, 3. Justices' Court, 1.

JUSTICES' COURT.

1. By statute, the jurisdiction of justices of the peace was restricted to certain actions, and judgments by confession might be entered for any sum not exceeding $150, "provided that such confession be in writing, signed by the person making the same, in presence of the justice or one or more competent witnesses." Laws 1833, p. 193. A judgment was rendered by a justice in these words, af-

ter entitling the cause: "Judgment by written confession of the above named defendants, in favor of the above named plaintiff, for eighty-eight dollars and eighteen cents damages, and costs of suit." *Held*, the judgment did not show, and was not *prima facie* evidence that the justice had jurisdiction of either the persons of the defendants, or the subject matter of the suit, and that it was therefore void. Spear *v.* Carter, 19.

2. A justice can render judgment on confession of the party only in those actions which he has jurisdiction to try. *Id.*

3. The statute, Sess. L. 1842, p. 135, sec. 4, provides, that no justice of the peace shall hold any court, or hear an examination, in any bar-room, grocery, or other room or place where spirituous or intoxicating liquors shall be sold. Where it appears from the justice's return that, on the day of trial, the cause was called in the bar-room of a tavern and adjourned to an adjoining room in the same house, but that the justice had no knowledge spirituous or intoxicating liquors were sold there, and no proof of the fact was offered on the trial, the court refused to reverse the judgment. Savier *v.* Chipman, 116.

4. In an action in a justice's court against defendant for falsely representing himself to have title to a piece of land, which plaintiff was induced to purchase of him, it was held, the title to the land must necessarily be drawn in question, and that the justice, therefore, had no jurisdiction of the case. Brooks *v.* Delrymple, 145.

5. The return to a summons in these words, "Served the within by reading personally,"—the statute requiring it to be served by reading it to defendant and delivering him a copy—is bad, and does not give the justice jurisdiction of the person of the defendant. Campau *v.* Fairbanks, 151.

6. By the justices' act, Laws of 1833, p. 193, sec. 1, "judgment by confession may be entered by any justice of the peace for any sum not exceeding one hundred and fifty dollars, provided such confession be in writing, signed by the person making the same, in presence of the justice or one or more competent witnesses." *Held*, a judgment on a confession not in writing, was void; and that where such judgment had been stayed, an action could not be sustained on the undertaking of the stay for the want of a consideration to support it. Wilson *v.* Davis, 156.

7. Where the plaintiff in a justice's court exhibits a promissory note endorsed by defendant, and states that he declares against defendant as endorser, without making any averment or statement as to the presentation of the note for payment, and notice of non-payment to defendant, the declaration is bad in substance and the judgment will be reversed. Barber *v.* Taylor, 352.

See Jurisdiction, 3.

LAPSE OF TIME.

1. Lapse of time, in connection with non-payment of interest and continued possession of the mortgagor, unaccompanied by any effort on the part of the mortgagee to enforce payment, is not a legal but an equitable or presumptive bar, and

the presumption may be rebutted by circumstances. What circumstances will rebut the presumption, must depend upon the facts in each particular case.
Abbott *v.* Godfroy's Heirs, 178.

2. In cases of presumptive bar from lapse of time, the rule as to subsequent disabilities is different from that of the statute of limitations. Under the statute, the party must bring himself within the exception of the statute; whereas, in cases of presumptive bar, he may show any circumstance that outweighs the presumption. *Id.*

3. On June 18, 1789, the ancestor of the defendants gave a mortgage, payable on 28th August, 1790. The mortgagee died in 1790, but administration on his estate was not granted until 1835, and the year following a bill was filed to foreclose the mortgage. *Held*, the presumption of payment arising from lapse of time was overthrown by the fact that there was no one, from the death of the mortgagee, in 1790, until administration was granted in 1835, who could receive payment of the money and discharge the mortgage. *Id.*

4. In equity, the statute of limitations, or objections in analogy to it upon the ground of laches, may be taken advantage of by demurrer; and if there be any ground of exception within the statute to prevent the bar, or ground to rebut the presumption arising from length of time, it should be stated in the bill.
Campau *v.* Chene, 400.

5. The rule extends to a bare equity against an equity, and is not limited to the enforcement of an equity against the legal estate. *Id.*

LIBEL.

It is not libelous to write and publish of and concerning one who is a druggist, "The above druggist in the city of Detroit refusing to contribute his mite with his fellow merchants for watering Jefferson Avenue, I have concluded to water said Avenue in front of Pierre Teller's store, for the week ending June 27th, 1846." People *v.* Jerome, 142.

LICENSE.

To flow land.

In an action for flowing land, an unrevoked parol license, given by a third person who had the right to flow, is a good defence. Millerd *v.* Reeves, 107.

To sell real estate.

1. A license was granted to an administratrix to sell real estate for the payment of debts, under an act of the late territory of Michigan, entitled an act directing the settlement of the estates of persons deceased, and for the conveyance of real estate in certain cases, adopted 27th July, 1818. The license was granted on the 12th January, 1827, but the sale did not take place until the 7th July, 1831. The sale was held to be void, as more than four years had elapsed between the granting of the license and the sale—the statute of limitations then in force, barring all claims against the estate after four years.
Campau *v.* Gillett, 416.

2. Where a license was granted by a county court to an administratrix to sell real estate, and after the granting of the license and before the sale, the law

giving the court jurisdiction was repealed, the sale was held to be void—the repeal of the law being a revocation of the license. *Id.*

To sell liquor.

See Evidence, 14.

LIEN. See Boats and Vessels.

LIMITATION OF ACTIONS.

1. Actions for the recovery of dower are not within the statute of limitations of 5th Nov., 1829, Laws 1833, p. 408. May *v.* Rumney, 1.

2. The right to dower is unlike any other right to land known to the law, and its peculiar nature is such as to exempt it from the operation of all general statutes of limitations, however broad and comprehensive, in which it it not named, or by unavoidable implication included. *Id.*

3. Debt on judgment recovered in 1824. Plea, statute of limitations. Replication, that in Nov., 1832, a pluries execution was taken out on the judgment; that on the 17th of the same month defendant filed a bill in chancery and obtained an injunction, restraining proceedings on the execution; that on 17th Nov., 1835, it was stipulated between the parties in the chancery suit, that the injunction be dissolved, that the pluries execution be set aside, that there be a reference to a master to take testimony in the chancery suit, and to state an account between the parties, to state the amount due on the judgment, and ascertain the amount of any and all legal and equitable set-offs to the judgment. That testimony was taken under the stipulation by both parties; that the master made his report in January, 1838, and that in March, 1846, the case was heard in the court of chancery, and a decree made dismissing the bill with costs. On demurrer, the replication was held bad, as the case did not come within the exceptions of the statute of limitations, and the replication did not show such an acknowledgment of the debt as would warrant the implication of a new promise. Ten Eyck *v.* Wing, 40.

4. Where a new promise is set up to take a case out of the statute of limitations, it ought to be proved in a clear and explicit manner, either expressly, or by such an unqualified acknowledgment as authorizes its implication. *Id.*

5. The acknowledgment should contain an unqualified and direct admission of a present subsisting debt, which the party is liable and willing to pay, and be unaccompanied by any circumstances or declarations which repel the presumption of a promise or intention to pay. *Id.*

6. S. sued M. in a justice's court, and employed W., an attorney at law, to appear and prosecute the suit for him on the return day. W. was prevented from attending to the suit on that day, and requested S. to appear, who appeared accordingly. M. objected so S.'s appearance, and required him to prove his authority, and S. not being able to prove a formal authority, the action failed. *Held*, these facts did not make out a case, within sec. 11 of ch. 2, tit. 6 part 3, R. S. 1838 (of the limitation of personal actions), allowing a new action to be brought within one year thereafter. Spier *v.* M'Queen, 252.

See Lapse of Time, 4.

LOSS OF PROMISSORY NOTES.

1. What is sufficient *prima facie* evidence of the loss of a promissory note, under R. S., ch. 102, sec. 88, p. 460, to admit parol evidence of its contents.
Higgins *v.* Watson, 428.

2. The bond to be executed by plaintiff to defendant, under R. S., ch. 102, sec. 89, upon bringing an action on a lost promissory note, should run to all of the defendants, although some of them have not been served with process. *Id.*

MANDAMUS.

A mandamus will be allowed to set an inferior court in motion, but not for the purpose of requiring it to come to any particular conclusion, or of retracing its steps where it has already acted; and this irrespective of the question, whether the party has or has not another remedy.
People *v.* Judges Wayne Co. Court, 359.

MATERIAL AVERMENTS. See Evidence, 4. Variance, 1, 2, 3.

MODERATOR OF SCHOOL DISTRICT. See Action, 2.

MISNOMER. See Replevin, 3.

MORTGAGES.

1. S. being endebted to W. & Co., as indorser on a promissory note, assigned to them as collateral security a mortgage he held against H., which W. & Co. were to collect and apply on the note. W. & Co. advertised the mortgaged premises for sale, under the statute; but, before the day of sale, it was agreed between them and S. that the premises should be bid off at the sale by A. S. W., for the amount due on the mortgage, and that he should hold them in trust for S. and W. & Co.; and that if within one year S. paid W. & Co. what was due on the note, A. S. W. should convey the premises to him, but if not, then he should sell them at public or private sale for what they would bring, pay W. & Co. from the proceeds, and the balance, if any, pay to S. In pursuance of the agreement the premises were bid off by A. S. W., for $572, the amount due on the mortgage. S. failed to pay W. & Co., and A. S. W. advertised and sold the premises, which were purchased by W. & Co. for $25, who afterwards sued S. for the balance due on the note. *Held*, S. could not show in bar of the action that the mortgaged premises purchased by W. & Co. were, at the time of sale, worth the amount due on the note. Weed *v.* Snow, 128.

2. An agreement in writing, intended by the parties to give a lien on real estate for the payment of a debt, though not witnessed as required by statute, to convey real estate, is good as an equitable mortgage.
Abbott *v.* Godfroy's Heirs, 178.

3. A bill filed to foreclose a mortgage stated that the defendant, being indebted to complainant in the sum of $750, confessed five several judgments for $150 each, before a justice of the peace—setting out the judgments as they were entered on the justice's docket—and that the mortgage was given to secure the payment of the judgments in one year. Defendant, by his answer, to which a replication was filed, admitted the judgments and mortgage, but denied the in-

debtedness, and insisted the judgments were void. The cause was heard on the pleadings, and the court, being of opinion the judgments confessed before the justice were void for not complying with the statute, dismissed the bill with costs. Austin *v*. Grant, 490.

See UNCONSTITUTIONAL LAWS, 5.

NOTICE.

It is a general rule of law and equity, that where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact. Norris *v*. Hill, 202.

NUISANCE.

1. Every obstruction to a street or highway is not a nuisance.
People *v*. Carpenter, 273.

2. Whether an obstruction in a street or highway, is or is not a nuisance, is a question of fact to be found by a jury, and not a question of law. *Id.*

OATHS. See COLLECTOR OF TAXES.

OBSCENITY. See INDICTMENT, 1.

ORDINANCE OF 1787.

The territory comprising the present state of Michigan remained under the control and jurisdiction of the British government until the year 1796; and the Ordinance of 1787, though made before that year, was not in force while the territory was under such jurisdiction. Abbott *v*. Godfroy's Heirs, 178.

PARTNERS.

A partner cannot submit partnership matters to arbitration without a special authority for that purpose from his copartners. Buchoz *v*. Grandjean, 367.

PARTIES TO BILL IN EQUITY.

In foreclosing a mortgage against the heirs of a deceased mortgagor, the personal representative of the deceased is not a necessary party, unless the personal estate is sought to be charged with a deficiency in the mortgaged premises to pay the debt. Abbott *v*. Godfroy's Heirs, 178.

PENALTY. See PENAL STATUTES. SPIRITUOUS LIQUOR. EVIDENCE, 12, 14.

PENAL STATUTES.

Where a penal statute is repealed, without a reservation or saving clause in favor of penalties that had accrued under it, such penalties cannot afterwards be recovered. Engle *v*. Shurts, 150.

PERJURY.

R. S. 1838, p. 639, sec. 2, does not make that perjury which is not material to the issue. People *v*. Collier, 137.

See INDICTMENT, 2, 3.

PHYSICIAN.

What constituted a physician, within the meaning of the Exemption Act (Sess. L. 1842, p. 70), and the act (Sess. L. 1844, p. 73) repealing ch. 2, tit. 8, part 1, R. S. 1838? *Query*. Sutton *v*. Facy, 243.

See EVIDENCE, 8. ERROR, 3.

PLEADINGS.

1. A plea in abatement to an indictment, that states several distinct facts having no relation to, or dependence upon each other, is bad for duplicity.
Findley *v*. People, 234.

2. A plea in abatement should be certain to every intent, and conclude by praying judgment of the indictment and that it may be quashed, and must be verified by affidavit. *Id.*

3. A plea within the meaning of sec. 17, ch. 92, R. S., is simply a statement of the grounds of defence, without regard to the form of stating them; and yet they should be stated with such certainty as to enable the opposite party to understand definitely upon what the defendant relies as his defence.
Porter *v*. Kimball, 239.

See GENERAL ISSUE. ABATEMENT. QUO WARRANTO.

PRACTICE IN CHANCERY. See PARTIES TO BILL IN EQUITY. FORECLOSURE.

PRESUMPTION.

1. The court will presume the law of a sister state is the same as that of their own state, unless the contrary is shown. Crane *v*. Hardy, 56.

2. The court will not presume spirituous liquors are sold in the bar-room of a tavern, when by law *every* license to keep a tavern does not authorise the sale of spirituous liquors. Savier *v*. Chipman, 116.

PRINCIPAL AND AGENT.

Plaintiff wrote to defendant, "I have on hand a lot of furs, which I am anxious to sell." Defendant replied, "I have this day written to Mr. Thomas G. Raitte, of Norwalk, who is my agent, to make you a visit for the purpose of purchasing your furs, and I hope and trust that you and Mr. Raitte will be able to make a bargain for your lot of furs." Raitte afterwards called on plaintiff and purchased the furs, paying part cash and giving a note for the balance, in the name of defendant. *Held*, 1st, that defendant was liable to plaintiff for the unpaid balance, as for goods sold and delivered; 2d, that evidence offered by defendant to prove an agreement between him and Raitte, by which defendant was to advance money to Raitte to purchase furs in his (Raitte's) name, and to have a lien for his advances on the furs purchased, &c., was properly rejected by the court on the trial. Sorrel *v* Brewster, 373.

See AGENT OF STATE PRISON.

PRINCIPAL AND SURETY.

1. A and B became surety for the payment of two judgments against C, by the 16th July thereafter, and C executed and delivered to them his promissory note and mortgage for $600, payable the 1st of August following, upon the understanding and agreement, that if C. paid the judgments and saved them harmless from all costs, trouble and expense on account of their having become surety for him, the note and mortgage were to be canceled. C failed to pay the judgments. *Held*,

(1.) That A and B, after the note and mortgage fell due, might foreclose the mortgage at law, by advertisement and sale under the statute, to raise the money to pay the judgments, and rid themselves of their responsibility.

(2.) That A, who purchased the premises on the mortgage sale, held them subject to the right of C to redeem, on paying the amount A had paid as surety for the mortgagor, with the costs of foreclosure and interest, and that a third person who purchased the premises of A, with a knowledge of the facts, took the land subject to the mortgagor's equity of redemption.

Thurston *v.* Prentiss, 193.

2. A surety who pays usurious interest to obtain time to pay the debt of his principal in, cannot collect the excessive interest so paid by him of his principal. *Id.*

3. Where judgment is confessed by principal and surety on a note given for money loaned, including usury, and execution is taken out and levied on the goods of the surety who pays the judgment, the principal is liable over to the surety for the usury paid by him, as well as the sum actually loaned with interest. *Id.*

PROBATE COURT. See Evidence, 10. License to sell land, 2, 3.

PROMISSORY NOTES.

1. A promissory note payable to bearer, or endorsed in blank, may be sued in the name of an agent who holds it for collection. Brigham *v.* Gurney, 349.

2. R. made his promissory note for $100, payable in six months, to O., or bearer, on the back of which was the following endorsement: "I guaranty," signed by W. It was held,

(1.) As there was no date to the endorsement, that, in the absence of all proof, the making of the note by R., and the endorsement by W., must be presumed to have been contemporaneous acts, and one entire transaction.

(2.) That R. and W. were joint and several promissors or makers of the note.

Higgins *v.* Watson, 428.

3. One Cram was indebted to the plaintiffs, who instructed their agent to call on him for payment or security. The plaintiff's agent called on Cram, and he not having the money to pay the plaintiffs, made a joint and several promissory note for $408, payable forty days after date, to the plaintiffs or bearer, signed his own name thereto, and the copartnership names of W. W. Cram & Co. and Wilcox & Co., of which firms he was a member, and he and the plaintiffs' agent then went to the defendants, S. P. and W. W. Mead & Co., who signed the name of their firm to the note at the request of Cram, when the note was de-

livered by Cram to the plaintiff's agent. Neither S. P. and W. W. Mead & Co. nor the plaintiff's agent were informed or knew that Cram had signed the names of W. W. Cram & Co. and Wilcox & Co., without authority from his copartners, which was the fact. *Held*, the defendants were liable to plaintiffs on their promise. Bowen *v.* Mead, 432.

4. A and B made their promissory note, payable to the order of C, at the Farmers' and Mechanics' Bank at Pontiac, and C and D endorsed the note in blank, and it was then discounted by the bank for the makers. Afterwards a judgment was obtained on the note against D, in the name of the bank, and E was appointed receiver of the bank by the court of chancery. E took a new joint and several note from C and D to himself, in part payment of the judgment, which last note was transferred to defendant after it became due, and the law under which the bank was organized, commonly called the general banking law, was subsequently adjudged to be unconstitutional. *Held*, that the illegality of the original transaction affected the new note, which was void, as there was no new consideration. Comstock *v.* Draper, 481.

See Declaration, 1. Loss of Promissory Notes.

QUO WARRANTO.

All it is necessary to state in a plea of title to an office, to an information in the nature of quo warranto, is, the authority for holding the election, the holding of it, and that defendant received the greatest number of votes for the office. People *v.* Van Cleve, 362.

RECOGNIZANCE. See Appeal, 6.

REGULARITY OF PROCEEDINGS. See County Court, 1.

REMEDY.

Where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and the party is confined to that remedy only, as to recover three-fold the amount of usurious interest paid, under R. S. 1838, p. 161, sec. 7. Thurston *v.* Prentiss, 194.

REPLEVIN.

1. "A quantity of corn consisting of about 200 bushels, and a quantity of rye consisting of about 100 bushels," is not a sufficient description of the property to maintain replevin. Stevens *v.* Osman, 92.

2. In replevin a defective description of the property must be taken advantage of by special demurrer, as it would be held sufficient after verdict, avowry, or plea of property in defendant. *Id.*

3. Where there has been misnomer of the defendant, in replevin, under R. S. 1838, the circuit court may, after service of the writ, but before the execution of the replevin bond, permit the plaintiff to file a new affidavit, and thereupon to amend the writ by inserting the true name of the defendant.

Parks *v.* Barkham, 95.

See General Issue, 1. Damages, 1, 2.

RULES.

Under R. S. 1838, the court had power to make Rule 11, adopted in 1843, requiring defendants, in suits commenced by filing a declaration, to plead thereto in thirty days after service of a copy of the declaration.

Norvell *v*. McHenry, 227.

SALE OF REAL ESTATE ON EXECUTION.

1. To pass the title to real estate sold on execution under the act of 1841, it is not necessary it should appear from the officer's return to the execution, that either of the appraisers was chosen by defendant, or that he had an opportunity to choose one. Crane *v*. Hardy, 56.

2. The settled doctrine as to sales under decrees and judgments is, that the purchaser is not concerned with anything except the judgment, levy and sale. All other questions are between the parties to the judgment and the officer making the sale. *Id*.

See ATTACHMENT, 1.

SCHOOL DISTRICT. See ACTION, 2.

SHERIFF. See DEPUTY SHERIFF.

SHIPS. See BOATS AND VESSELS.

SPIRITUOUS LIQUORS.

The penalty given by R. S., ch. 41, sec. 1, for sellling wine, brandy, rum or other spirituous liquor, without a license as tavern keeper or common victualler, may be recovered by indictment. People *v*. Hart, 467.

See UNCONSTITUTIONAL LAWS, 6.

STATUTE. See REMEDY.

STATUTORY FORECLOSURE.

1. An affidavit of publication of notice of sale of mortgaged premises in a statutory foreclosure, made between seven and eight years after the sale took place, is not presumptive evidence of the facts therein stated, under sec. 9, R. S. 1838, p. 501. Mundy *v*. Monroe, 68.

2. Where mortgaged premises were advertised by the mortgagee, in pursuance of the statute, to be sold under a power of sale in the mortgage, and the mortgagee afterwards, and before the day of sale, assigned the mortgage to a third person, who continued the advertisement in the mortgagee's name, instead of advertising anew as assignee in his own name, and on the sale purchased the mortgaged premises, the sale was held irregular and void, and not to bar the mortgagor's equity of redemption. Niles *v*. Ransford, 338.

See PRINCIPAL AND SURETY, 1.

STAY OF EXECUTION.

Where, between the argument of a cause in error and the decision of the court affirming the judgment, the debtor has been discharged in bankruptcy, on motion the court will grant a perpetual stay of execution. Park *v*. Goodwin, 35.

See JUSTICES' COURT, 6.

SUMMONS. See Justices' Court, 5.

SUPERVISORS. See Bond, 2.

SURETY FOR COSTS. See Costs. Arbitration, 1.

TAXES.

A rail road company incorporated before the late revision of the statutes, whose charter is silent as to taxation, is liable to pay the specific tax imposed by R. S., ch. 21, sec. 5, p. 121. People *v.* Detroit and Pontiac R. R., 458.

See Collector of Taxes.

TAX DEEDS.

To entitle a tax deed given in 1838, to be received as evidence of title, the regularity of the proceedings prior to the tax sale must be shown.
Ives *v.* Kimball, 308.

TROVER. See Damages, 1.

UNCURRENT MONEY. See Justice of the Peace.

UNDER SHERIFF.

The under sheriff may act in his own name, and need not sign a return to a writ served by him in the name of the sheriff. R. S. 1838. Were it otherwise, when the writ appears from the return to have been served by a proper officer the return is amendable, and a judgment will not be reversed by reason of the defect. Calender *v.* Olcott, 344.

UNCONSTITUTIONAL LAWS.

1. The act, Sess. L. 1843, p. 139, inhibiting actions of ejectment by mortgagees before foreclosure of the mortgage and the expiration of the time of redemption, is unconstitutional and void as to mortgages in existence at the time of its passage. Mundy *v.* Monroe, 68.

2. An act was passed by the legislature for the organization of banks, generally, declaring them to be *corporations*, and making the directors individually liable for the debts of the corporation in case of insolvency. So much of the act as purported to confer *corporate* rights on the banks organized under it, was afterwards decided to be unconstitutional. By a prior act, banking was made unlawful unless authorized by law, and penalties were imposed for its violation. In an action brought against the directors of an insolvent bank organized under the first named law, it was held that the act against banking was not repealed by the first named act, except in favor of *incorporated banks* organized under it; and, as by the constitution *corporations* could not be created under it, the banks so organized were illegal, and therefore the action could not be sustained.
Brooks *v.* Hill, 118.

3. On the change from a territorial to a state government, the legislature of the state abolished the supreme court of the territory, and transferred certain causes pending therein to the supreme court and court of chancery of the state; but certain other causes pending therein, owing to a defect in the law, were not transferred to any court. The following year, the legislature passed an act

transferring these last mentioned causes to the supreme court of the state. *Held*, That it was competent for the legislature to pass the act last mentioned, and that by virtue thereof, the causes were transferred to the supreme court of the state, to be proceeded in and disposed of. Scott *v* Smart's executors, 295.

4. To hold a law unconstitutional, it must be a plain violation of some provision contained in the constitution. It must be an ex post facto law, or a law impairing the obligation of contracts, or a law manifestly in collision with some constitutional provision. *Id.*

5. A mortgage containing a power of sale was given in January, 1847, and the mortgaged premises were advertised and sold under the power in July, 1848. Between the giving of the mortgage and the sale, the law regulating the time of redemption by the mortgagor was changed from two years to one year. It was held, that the law in existence at the time the mortgage was executed and delivered, was a part of the contract: that the mortgagor had two years from the sale to redeem in, and that the law in force at the time the sale took place, restricting the redemption to one year, was unconstitutional, so far as it respected mortgages in existence at the time the law took effect. Cargill *v*. Power, 369.

6. Whether the proviso of sec. 18, ch. 41, R. S., is void—*query*. If it be, the other provisions of the chapter are valid and in force, and it is not a sound objection to the validity of the law, that it prohibits the sale of spirituous liquors without a license, and no license can be obtained after a vote of no license.
Smith *v*. Village of Adrian, 496.

USURY.

Usury, under R. S. 1838, is a personal defence, to be interposed by a party to the contract, of which a subsequent purchaser cannot avail himself.
Farmers' and Mechanics' Bank *v*. Kimmel, 84.

See Principal and Surety, 2, 3.

VARIANCE.

1. Where, in an action of debt on a bond, the declaration alleged that the defendants acknowledged themselves to be held and firmly bound unto "the board of supervisors of the county of St. Joseph," and by the bond produced on the trial they were bound unto "the supervisors of the county of St. Joseph," the court held there was a variance between the bond declared on and the one produced, and that plaintiffs should have averred in their declaration that the bond was made to them by the name mentioned in the bond.
Supervisors of St. Joseph *v*. Coffenbury, 355.

2. In an action on a warranty of a span of horses, the delaration stated the consideration to be a yoke of oxen of the value of $80, and a note for $20, and on the trial it appeared the note was for $10 only. The variance was held to be fatal. Harrington *v*. Worden, 487.

3. Had the averment been, the sale was for a valuable consideration, to wit: for one yoke of oxen and a note for $20, it would not have been necessary to prove with precision the items of the specification. *Id.*

See Evidence, 4.

VERDICT.

1. A verdict in ejectment was as follows: "The jury find for the plaintiff, and that the plaintiff is entitled to the possession, during her lifetime, of the one undivided third part of [describing four eighty acre lots, according to the Uni-States survey], except so much of said two last described portions or parcels of land as is contained in the record of the plat of the village of Royal Oak, recorded in record of deeds for said county of Oakland, as the reasonable dower of the said plaintiff in said premises." *Held*,

(1.) That the description of the land in the verdict was sufficiently certain, and that it would be good in a declaration.

(2.) That although the verdict did not find defendant wrongfully withheld the premises, yet that it was good, as it was intelligible, and no doubt could arise as to what was the intention of the jury. Lockwood *v.* Drake, 14.

2. Where there are two issues—the general issue, and an issue on a special plea—and the jury find a verdict for plaintiff on the general issue, but rendered no verdict on the other issue, the judgment will not be reversed, if the verdict on the general issue negatives the special plea of defendant on which the other issue was joined, and the jury could not have found for plaintiff had defendant established his special plea. Brooks *v.* Delrymple, 145.

VOTES. See Board of County Canvassers.

WAIVER.

By appearing and going to trial in an attachment suit, defendant waives all prior irregularities. Crane *v.* Hardy, 56.

See Challenge, 4. Arbitration, 2.

WATER POWER.

Where complainants, who were the owners of three-fourths of a water power, were compelled to purchase a piece of land to secure to the proprietors of the power the right to flow it, a court of equity will not decree contribution by the owner of the other fourth of the water power. Norris *v.* Hill, 202.

See Deeds, 5.

WILLS.

1. A will, after devising the real estate of the testator, contained the following clause, viz: "It is my will that all my furniture and property be in common to my beloved wife, Elizabeth Holiday, and daughter, Jane J. Holiday, so long as they live and keep house together, and that whenever they separate or break up house keeping, that the furniture be divided between them, at their own discretion, and the stock of cattle to be given up to my beloved wife Elizabeth, for her sole use and behoof." *Held*, that a claim which the testator had against the Chippewa Indians, and which was allowed and paid over to the executor under a treaty concluded after the testator's death, between the Indians and the United States, did not pass under it to the widow and daughter. Jameson, Appellant, &c., 97.

2. No rule is better established, than that general words in a will may be restrained in their meaning, or rejected entirely, to carry out the intention of the testator. So general words may be construed by the particular words which follow. *Id.*

WRITS OF ERROR.

A writ of error does not lie from this court to a county court in civil cases.
Hiney *v.* Cade, 163.

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